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THE LAW RELATING
TO
OIL AND GAS

INCLUDING

Oil and Gas Leases and Contracts, Production of Oil and Gas, both Natural and Artificial, and Supplying Heat and Light thereby, whether by Private Corporations or Municipalities, Regulating Gas Companies, Insurance, Negligence, Transportation, Explosives, Forms of Oil and Gas Leases and Contracts, etc.

With all Federal, State and Ontario Statutes pertaining to Natural Gas and Oil

THIRD EDITION

BY

W. W. THORNTON

Judge of the Superior Court of Marion County, Indiana

Volume I

CINCINNATI
THE W. H. ANDERSON CO.

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PREFACE TO THIRD EDITION.

The first edition of this work appeared January 1, 1904. It was not a pioneer work on the subject of Oil and Gas, but its sole predecessor was a very elementary and rather small work, for the law then relating to petroleum and natural gas had been but little developed. No pretense prior to the issue of this work had been made to cover the entire field that it covers.

The second edition was issued July 1, 1912, eight and a half years later. Since the second edition five and a half years have elapsed, during which time many cases relating to the production of petroleum and natural gas have been made. This is particularly true of oil and gas leases. In the last five and a half years many new territories have been opened up and new fields developed. This has resulted in much litigation, and the presentation of many new legal problems to the courts for solutions.

In this, as in the second edition, all the legislation of the several states, and also of the United States on the subject of petroleum and natural gas now in force has been collected in an appendix. Great care has been used to collect all the statutes on that subject now in force. Necessarily, many states are not represented in the appendix, for the reason that in them neither petroleum nor natural gas is produced.

As in the first edition, all subjects relating to Oil and Gas and their transportation (except the one of inspection by the states)—even artificial gas—has been discussed at length. This is particularly true of explosions. In no other work has that subject been as thoroughly examined. Many cases on explosions have been cited that cannot be found in the regular reports of

court decisions. Efforts have been made to cite every case in this country, in England and in her provinces bearing upon the subject of Oil and Gas, until the date of going to press.

Special attention has been given to the relations of gas companies to their patrons; this volume containing the last word on that subject.

This edition is submitted to the legal profession with the belief that it will meet with the same degree of favor that was accorded the former editions.

W. W. THORNTON.

Indianapolis, Ind., March 1, 1918.

PREFACE TO FIRST EDITION.

The production of petroleum in this country annually amounts to millions of barrels, and in value to millions of dollars. It is one of the greatest industries of this country. The value of natural gas annually flowing from the earth is of almost inestimable value. Since petroleum and natural gas became commercial products, thousands of cases concerning their production, sale and transfer, involving new and unusual questions, have been decided in our courts, many of which have been reported in official and unofficial publications. These "new and unusual questions" have, at times, sorely tried the courts to determine and settle the rights of the contending parties according to legal principles and in accordance with justice. Cases have come before the courts involving many questions of so unique a character that no precedents could be found. Necessarily, there has grown up quite a body of law, unknown to the past generations. To collate and discuss the many cases involving questions concerning petroleum and natural gas, and the rights and liabilities involved in their production, sale and transportation, has been one of the objects of the author in the preparation of this volume.

The subject of oil contracts has also been discussed at length.

Much prominence has been given to the subject of oil and gas leases,—by which is meant leases of lands for the purpose of developing them to secure petroleum and natural gas,—and questions growing out of that subject. Early in the preparation the author perceived the impossibility to reconcile all the cases upon this subject, and to harmonize them in a satisfactory manner. What he has attempted to do has been to state the questions decided, at times giving his own views for whatever

they may be worth. He has cited many cases, where he thought them applicable, upon the subject of mining of solid minerals, — coal mining cases, — believing that those using this work would find such cases of value and aid them in their practice. In this he has gone far beyond the line adopted by writers upon the subject of oil and gas. Especial care has been taken to secure citations of all cases upon this subject.

The work is not confined merely to the subject of petroleum and natural gas, and their production. The production and supplying of artificial gas has been treated at length, — much more so, it is believed, than can be found elsewhere either in this country or England. The duty of a gas company to furnish gas to the consumer, its liability for failure to furnish him gas, and its liability to him for neglect whereby he or others are injured by leaking or exploding gas has been treated at considerable length.

Particular attention has been given to the powers of municipalities to light their streets, to furnish gas to their inhabitants, and their relations to gas companies, and the right of these companies to use streets and highways for the laying of their pipes or mains therein. It is believed that nowhere else has the subject of exclusive or monopolistic grants, — the right to occupy the streets, to the exclusion of all other competitors, — been treated as exhaustively as in the present work.

The right of a municipality or a legislature to regulate gas companies and to control their rates to customers has received particular attention.

Upon these subjects electric lighting and street railway cases have been frequently cited, as well upon the subject of the right of electric and street railway companies using the streets of a city.

A chapter has been devoted to the subject of insurance in connection with use and storage of oil and gas in the building insured.

The aim has been to not only make this volume a useful and convenient work for the practitioner having an oil or gas lease or contract under consideration, but also for attorneys of

PREFACE.

municipalities and artificial and natural gas companies who are investigating the rights and duties arising between municipalities and gas companies, as well as the rights and duties of gas companies to the inhabitants of such cities and to their patrons or customers.

Forms of oil and natural gas leases and contracts used in Pennsylvania, West Virginia, Ohio, Indiana, Kansas and Texas have been inserted in the Appendix, which it is believed will be found to be useful.

W. W. THORNTON.

Indianapolis, Ind.

January 1, 1904.

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CHAPTER I.

HISTORICAL SKETCH.

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§ 1. Petroleum known to ancients.

Petroleum was not unknown to the ancients. It is related chemically closely to asphalt or asphaltum.¹ Asphalt was used in cementing the stone walls of Nineveh and Babylon, even in laying the famous Tower of Babel; and is called in the Old Testament "slime of mortar." Slime pits were near the city Is, the present Hit, on the river Is, a tributary of the Euphrates—

¹ "When the Jews were led into Persia they found pits in which the priests concealed the sacred fire they required for their sacrifices."—2 Maccabees, Chap. 1. The contemporaries of Nehemiah, in after years, in searching for this concealed fire,

found an oil, which, poured on the hot stone used in sacrifices, burst into high flames. These pits the Jews closed and applied to them the term *nephtar* or *nephtoj*—a place of expiation. Hence our word naphtha.

sometimes called the Spring of Is.² This spring attracted the attention of Alexander and Trajan. Mention is made in the Old Testament of fountains and springs of oil, which may be taken without doubt to relate to petroleum springs. Asphaltum is quite common in the Dead Sea regions, especially upon the shores of that mysterious body of water. The Egyptians knew the value and use of petroleum and asphalt; for they soaked the cerements of the dead in them, which has been one of the factors in the preservation of the mummies to the present day. A mummy will readily burn, because of the fact that it was wrapped in clothes soaked in petroleum or liquid asphaltum.³ Their term for it was "rock oil"; and it is supposed that they got it near a place on the western mouth of the Gulf of Suez, called at the present day Djebel-ez-Zeit, which is the Arabic name for "Oil Mountain." Oil was discovered at that place in February, 1886. The oil fountains of Hit were celebrated among the Arabs and Persians. Herodotus, four hundred and fifty years before the Christian Era, makes mention of the then famous Spring of Zante, Zante being one of the Ionian Islands. Pliny and Dioscorides speak of the oil taken from the earth at Agrigentum, Sicily, and of its use in lamps as "Sicilian Oil." From time immemorial, near Rivanazzano, in Sardinia, small rills of oil have run from the earth. The famous Caspian region, or Baku district, was well known to the ancients, they making use of the oil and gas of that region.⁴ It is supposed that the famous Greek Fire was nothing more than combustibles soaked in petroleum, obtained from that country; for it is known that Greece received petroleum from the port of Phanagoria. In limited quantities it was known to the Chinese, probably many centuries before the beginning of the present Era. Their earliest records show a knowledge of it. It was probably not unknown in India at an early day, and to the Romans when they invaded the present territory of Galicia, of Moldavia, and of Wallachia, where it now is obtained in great quantities.⁵

² Mentioned by Herodotus, 450 B. C., as eight days' journey from Babylon.

³ They used liquid asphaltum in laying up stones.

⁴ Brannt on Petroleum, 20.

⁵ Brannt on Petroleum, 2.

§2. Early discoveries of petroleum in United States.

The Jesuit Fathers in this country in early times made mention of burning springs; which were nothing more than oil set afire that had accumulated on the surface of the water of springs — usually what may be termed stagnant springs. One of these writers was a Franciscan missionary, Joseph de la Roche d'Allion, who wrote a letter in 1629 describing such a spring, and which is printed in Sagard's *Histoire du Canada* in 1636.⁶ On Oil Creek, in Venango County, Pennsylvania, were to be seen in the first half of the present century a number of pits, fifteen or twenty feet across, some circular, some oval, and some square, carefully cribbed or walled up with timber or logs. In the bottom of these pits were growing trees, centuries old. The oil had preserved the timber with which they were walled. The theory has been advanced that they were constructed by that mysterious race which preceded the American Indian, who inhabited that region at the first discovery of America by the Europeans; and that that race was the same as the one which operated the copper mines of the Lake Superior country.⁷ As early as 1750 a French officer located at Fort Duquesne (the present site of Pittsburg), in a letter to General Montcalm, then located at Quebec, described oil found in a region which was evidently the region of Oil Creek as now known.⁸

"While descending the Allegany," said he, "fifteen leagues below the mouth of the Connewango, and three above the Venango, we were invited by the chief of the Senecas to attend a religious ceremony of his tribe. We landed, and drew up our canoes on a point where a small stream entered the river. The tribe appeared unusually solemn. We marched up the stream about half a league, where the company, a large band it appeared, had arrived some days before us. Gigantic hills begirt us on every side. The scene was really sublime. The great chief

⁶ On an old map of 1670, yet preserved, is marked a "Fontaine de Bitume," located near the present village of Cuba, New York.

⁷ Brant on Petrolenn. 4.

⁸ On "A General Map of the Mid-

dle Colonies of America," etc., by Lewis Evans, published at Philadelphia in 1755, the existence of petroleum in the present States of both Pennsylvania and Ohio is indicated.

then recited the conquests and heroism of their ancestors. The surface of the stream was covered with a thick scum, which, upon applying a torch at a given signal, burst into a complete conflagration. At the sight of the flames the Indians gave forth the triumphant shout that made the hills and valleys re-echo again. Here, then, is revived the ancient fire-worship of the East; here, then, are the children of the Sun."⁹

In 1749 Peter Kalm, a celebrated Swedish botanist landed in this country, and spent three years in travel. In 1753 and 1761 he published an account of his travels, in which he described the oil springs of Western Pennsylvania. In the latter part of the eighteenth century in the correspondence of that time, frequent mention is made of oil observed in springs and floating on water in Western Pennsylvania, Eastern Ohio, Western Virginia, and Eastern Kentucky.¹⁰ It is said that General Washington, in 1775, when visiting the Kanawha Valley, set aside to the public a square mile of land, on which was located a gas well, above Salt Lick; but a defect in the deed, afterwards discovered, rendered the conveyance void. As early as 1814, in Washington County, Ohio, thirty miles north of Marietta, in sinking a salt well, both petroleum and gas were found. A similar well was bored in 1819 in Wayne County, Kentucky, and it yielded so much black petroleum that it was abandoned. In 1829 a salt well bored near Burkesville, Cumberland County, of the same State, yielded great quantities of oil, estimated to amount to fifty thousand barrels up to 1860, most of which was lost. Some of it was sold as a medicine under the name of "American Oil." In 1840 a well at this place spouted oil at the rate of seventy-five gallons a minute for a short period. In 1857 oil was discovered by one Shaw, in Enniskillen township, in the Province of Western Ontario; and later a well was dug which proved to be a flowing one at the rate of fifty-five gallons a minute. The first flowing well was discovered January 11, 1862, on Black Creek, of that township. In 1854 petroleum springs were dis-

⁹ Henry's History of Petroleum, 11.

¹⁰ Loskiel, in his "History of the United Brethren Among the Indians

in North America." in 1788, speaks at length of petroleum in Pennsylvania and Ohio. See the account in Brannt, p. 5.

covered fifteen miles west of Tulare Lake, California, by the United States Government officers.

§3. Early account of a western New York oil spring.

As early as 1833 Prof. Benjamin Silliman, Jr., of Yale College, visited an oil spring or pool in the western part of Allegany County, New York, and wrote a very interesting account of his visit and the result of his examination. The oil taken from this spring or pool was sold as "Seneca Oil" for medicinal purposes.

"The Oil Spring, as it is called," said he, "is situated in the western part of the County of Allegany, in the State of New York. This county is the third from Lake Erie on the south line of the State, the counties of Cattaraugus and Chautauqua lying west, and forming the southwestern termination of the State of New York. The Spring is very near the line which divides Allegany and Cattaraugus. Being in the County of Allegany, I was indebted to the kindness of a friend, who on the 6th of September took me from Angelica to the Spring. After crossing the Genesee River, our ride was to the town of Friendship, six miles; then to Cuba, eight miles; and thence into the township of Hinsdale, three and a half miles, making seventeen and a half miles from Belvidere, the county-seat of Phillip Church, Esq., and twenty-one miles from Angelica village. The place will be found without difficulty by taking a guide at Hick's tavern, which is on the corner of the road to Cuba where it is intersected by the road to Warsaw, two miles west of Cuba. The last half mile is in the forest; and a road is cut, for the greater part of the way, through the woods; but the path becomes finally an obscure foot-track in which a stranger without a guide might easily lose his way, or at least fail of finding the object of his search. The country is rather mountainous; but the road running between the ridges is very good, and leads through a cultivated region rich in soil and picturesque in scenery. Its geological character is the same with that which is known to prevail in this western region; a silicious sandstone, with shale, and in some places limestone is

the immediate basis of the country. The sandstone and shale (the limestone I did not see) lie in nearly horizontal strata. The sandstone is usually of a light gray color, and both it and the shale abound with entrocites, encrinites, corallines, terebratula, and other reliquæ, characteristic of the secondary transition formation. The Oil Spring or fountain rises in the midst of a marshy ground. It is a muddy and dirty pool of about eighteen feet in diameter, and is nearly circular in form. There is no outlet above ground, no stream flowing from it; and it is of course a stagnant water, with no other circulation than that which springs from the changes of temperature and from the gas and petroleum that are constantly rising on the surface of the pool. The water is covered with a thin layer of petroleum or mineral oil, giving it a foul appearance as if coated with dirty molasses, having a yellowish-brown color. Every part of the water was covered by this film, but it had nowhere the irradiance which I recollect to have observed at St. Catherine's well, a petroleum fountain near Edinburgh in Scotland. There the water was pellucid, and the hues produced by the oil were brilliant, giving the whole a beautiful appearance. The difference is, however, easily accounted for. St. Catherine's well is a lively, flowing fountain, and the quantity of petroleum is only sufficient to cover it partially, while there is nothing to soil the stream: in the present instance, the stagnation of the water, the comparative abundance of the petroleum and the mixture of leaves and sticks and other productions of a dense forest preclude any beautiful features. There are, however, upon this water, here and there, spots of what seems to be a purer petroleum probably recently risen, which is free from mixture, and which has a bright brownish-yellow appearance—lively and sparkling. Were the fountain covered entirely with this purer production, it would be beautiful. We were informed that when the fountain is frozen, there are always some air holes left open, and that in these petroleum collects in unusual abundance and purity, having distinctly the beautiful appearance which has just been mentioned as now occurring here and there upon the water. The cause of this is easily understood. The petroleum being protected by the ice from the impurities which at other times

fall into it, escapes contamination, and being diverted to the air holes both by its lightness and by the gas which mixes with it, collects there in greater quantity and purity. All the sticks and leaves, and the ground itself around the fountain, are rendered more or less adhesive by the petroleum. They collect the petroleum by skimming it like cream from a milk-pan. For this purpose they use a broad, flat board, made thin at one edge like a knife. It is moved flat upon and just under the surface of the water, and is soon covered by a coating of petroleum which is so thick and adhesive that it does not fall off, but is removed by scraping the instrument upon the lip of a cup. It has then a very foul appearance like very dirty tar or molasses; but it is purified by heating it, and straining it while hot through flannel or other woolen stuff. It is used by the people of the vicinity for sprains and rheumatism and for sores upon their horses. It is not monopolized by any one, but is carried away freely by all who care to collect it, and for this purpose the spring is frequently visited. I could not ascertain how much is annually obtained. But the quantity is considerable. It is said to rise more abundantly in hot weather than in cold. Gas is constantly escaping through the water, and appears in bubbles upon the surface. It becomes much more abundant, and rises in large volumes whenever the mud at the bottom is stirred by a pole. We had no means of collecting or of firing it; but there can be no doubt that it is the carburetted hydrogen — probably of the lighter kind, but rendered heavier and more odorous by holding a large portion of the petroleum in solution. Whenever it is examined we should expect, of course, to find carbonic acid gas mingled with it, and not improbably ozate or nitrogen. We could not learn that any one had attempted to fire the gas as it rises, or to kindle the film of petroleum upon the water. We were told that an intoxicated Indian had fallen into the pool and been drowned many years ago, but that his body had never been recovered. The story may be true, and if true, it would be a curious inquiry whether the antiseptic properties of petroleum so well exemplified in the Egyptian mummies may not have preserved his body from putrefaction. The history of this spring is not distinctly known. The Indians were well acquainted

with it, and a square mile around it is still reserved for the Senecas. As to the geological origin of the spring, it can scarcely admit of a doubt that it rises from beds of bituminous coal below. At what depth we know not, but probably far down. The formation is doubtless connected with the bituminous coal of the neighboring counties of Pennsylvania and of the west rather than with the anthracite beds of the central parts of Pennsylvania.”¹¹

§4. Washington county, Ohio, oil well.

An account was given in 1833 of the Washington County, Ohio, well, by Dr. S. P. Hildreth, of Marietta, which is of unusual interest at the present day.

“The greater abundance of stone coal in this locality,” said he, “than in that of the Muskingum, gives it a decided advantage in the elaboration of petroleum. On the latter river the wells afford but little oil, and that only during the time the process of boring is going on. It ceases soon after the wells are completed, and yet all of them abound more or less in gas. A well on Duck Creek, about thirty miles north of Marietta, owned by Mr. McKee, furnishes the greatest quantity of any in this region. It was dug in the year 1814, and is four hundred and seventy-five feet in depth. Salt water was reached at one hundred and eighty-five feet, but not in sufficient quantity. However, no more water was found below this depth. The rocks passed were similar to those on the Muskingum River, above the flint stratum, or like those between the flint and salt deposits at McConnellsville. A bed of coal two yards in thickness was found at the depth of one hundred feet, and gas at one hundred and forty-four feet, or forty-one feet above the salt rock. The hills are sandstone, based on lime, one hundred and fifty or two hundred feet in height, with abundant beds of stone coal near their feet. The oil from this well is discharged periodically, at intervals of from two to four days, and from three to

¹¹ American Journal of Science, 1833, set out in full in Henry's History of Petroleum, pp. 12-19.

six hours' duration at each period. Great quantities of gas accompany the discharges of oil, which for the first few years amounted to from thirty to sixty gallons at each eruption. The discharges at this time are less frequent and diminished in amount, affording only about a barrel per week, which is worth at the well from fifty to seventy-five cents a gallon. A few years ago, when oil was most abundant, a large quantity had been collected in a cistern holding thirty or forty barrels. At night some one engaged about the works approached the well-head with a lighted candle. The gas instantly became ignited, and communicated the flames to the contents of the cistern, which, giving way, suffered the oil to be discharged down a short declivity into the creek, where the water passes with a rapid current close to the well. The oil still continued to burn most furiously, and spreading itself along the surface of the stream for half a mile in extent, shot its flames to the tops of the highest trees, exhibiting the novel and perhaps never before witnessed spectacle of a river actually on fire."¹²

§5. The first oil well in United States.

In 1853 George H. Bissell saw a bottle of crude petroleum in the office of Professor Crosby, of Dartmouth College. On examining it, he at once perceived its true value. He was engaged in the practice of law in New York City with J. G. Eveleth; and he proposed to his partner that they proceed at once to Titusville and inspect the territory. The result of this visit was that they, in 1854, purchased one hundred and five acres of Brewer, Watson & Company, and leased another tract of about the same size for ninety-nine years, for five thousand dollars. The deed bore date of November 10, 1854; and the land was situated on Oil Creek, in Cherrytree Township, Venango County, and covered the Island situated at the junction of Pine and Oil Creeks. On December 30, 1854, Jonathan G. Eveleth, George H. Bissell, James H. Salisbury and Dexter A. Hawkins of New York, Francis B. Brewer of Titusville and

¹² American Journal of Science, Henry's History of Petroleum, pp. July, 1833, set out nearly in full in 21-26.

Anson Sheldon of New Haven, Connecticut, organized and incorporated the Pennsylvania Rock Oil Company, the first oil company incorporated in America. On January 16, 1855, the territory above described was leased to the new oil company. Although the new company had its leases, there was an uncertainty how the oil should be developed; and the enterprise was allowed to drag. Professor Silliman had been given two hundred shares of stock in the new company, in order to make him president of it; but owing to the small amount of petroleum obtainable, he never expected much to come of the venture. Speaking of the plan of development, Mr. Henry says: "The idea came from another quarter, and was suggested by an incident as trifling as that which disclosed the law of gravitation. While seeking shelter beneath the awning of a Broadway drug store one scorching day in the summer of 1856, Mr. Bissell's eye fell upon a remarkable show-bill lying beside a bottle of 'Kier's Petroleum,' in the window. His attention was arrested by the singularity of displaying a four hundred dollar bank note in such a place; but a closer look disclosed to him the fact that it was only an advertisement of a substance in which he was deeply interested. He stepped in, and requested permission to examine it. The druggist took it from the window, and, having plenty of them, told him to keep it. For a moment he scanned it, scrutinizing the derricks, and remarking the depth from which the oil was drawn, when instantly, like an inspiration, it flashed upon him that this was the way their lands must be developed — by artesian wells." Nearly two years were allowed to elapse before arrangements were completed which enabled the Oil Company to send out a man to its leased territory to begin operations. They selected Mr. E. L. Drake, of New Haven, conductor on a passenger railway train, who came to be known in the history of oil operations as "Colonel Drake," to begin operations. He arrived in the future oil territory about May 1, 1858. Drake faced many difficulties when he arrived at the field of his future operations, among which was the want of ready money, the difficulty of finding suitable operators, and the novelty of the scheme. Mr. Kier, the patent medicine man of Pittsburg, had recommended to Mr. Bissell "Uncle Billy Smith" and his two

sons as suitable men; and they were brought to Titusville in June, 1859, when operations began. "Aggravating delays followed," says Mr. Henry. "In artesian boring it is necessary to begin on the rock to drill. This had been previously done by digging a common well-hole and cribbing it up with timber. When the rock is within a few feet of the surface it is still the cheapest and easiest method, but in some localities to do so would be practically impossible. They started to dig a hole, but it so persistently caved in and filled with water when they got a few feet below the surface, that Drake determined to give it up and try an experiment that had suggested itself to his mind. This was the driving of an iron tube through the quicksand and clay to the rock. If this is exclusively his own invention, which is probable, it is a pity he did not procure a patent on it. The royalty would have afforded him at least a competency, though the driving pipe is not so much in use as formerly." The operators in the oil region have had the benefit of this invention without any return, unless indeed we except the good feeling which prompted them to send him a present of \$4,200, when they heard he was sick and in need. "The pipe was successfully driven to the rock thirty-six feet, and about the middle of August the drill was started. The drillers averaged about three feet a day, making slight 'indications' all the way down. Saturday afternoon, August 28th, 1859, as Mr. Smith and his boys were about to quit for the day, the drill dropped into one of those crevices, common alike in oil and salt borings, a distance of about six inches, making the total depth of the whole well 69½ feet. They withdrew the tools, and all went home till Monday morning. On Sunday afternoon, however, 'Uncle Billy' went down to the well to reconnoitre, and peering in he could see a fluid within eight or ten feet of the surface. He plugged one end of a bit of tin water spout and let it down with a string. He drew it up filled with petroleum. That night the news reached the village, and Drake, when he came down next morning bright and early, found the old man and his boys proudly guarding the spot, with several barrels of petroleum standing about. The pump was at once adjusted, and the well commenced producing at the rate of about twenty-five barrels a day. The news spread

like lightning. The village was wild with excitement. The country people round about came pouring down to see the wonderful well. Mr. Watson jumped on a horse and hurried straightway to secure a lease of the spring on the McClintock farm near the mouth of the creek. Mr. Bissell, who had made arrangements to be informed of the result, by telegraph, bought up all the Pennsylvania rock-oil stock it was possible to get hold of, soon securing most of that owned in New Haven, and four days afterward was at the well."¹³ "This memorable strike," says Crew, "ushered in the Petroleum Era."¹⁴

§6. Other first oil wells in United States.

Naturally this great "find" of oil created tremendous excitement, and immediately suggested the putting down of other wells. The second well was put down in February, 1860, by Barnsdal, Meade and Rouse, to a depth of one hundred and sixty feet, resulting in a production of forty to fifty barrels daily. This well was on the Watson Flats, below Titusville. The third well was located on the afterwards famous McClintock farm. It was completed in the spring of 1860, and was sunk by a Mr. Angier for Brewer, Watson and Company. These wells had to be pumped. The first flowing well was produced in the summer of 1860, on the Buchanan farm near Rouseville, called

¹³ Henry's History of Petroleum.

¹⁴ Crew on Petroleum, 142.

Colonel Drake made considerable money in oil investments, but lost it all in New York City speculating in oil stocks. Becoming an invalid, he was taken by his wife to Vermont, with their children, and afterwards to the highlands of New Jersey, in order that he could have the benefit of the sea breeze. They lived in abject poverty, his wife supporting the family with her needle. With an effort she one day raised forty cents to enable him to go to New York City to see if he could not find something he could do or secure some aid. He met an old acquaintance from

Titusville, who gave him his dinner and furnished him money to return home. On arriving at Titusville this friend raised for him \$4,200 as a present. With the proceeds of this sum the family were enabled to live plainly but comfortably for several years. They settled in Bethlehem, Pa., and in 1873 that State provided for him a pension of \$1,500 a year for life, and in case his wife survived him, the pension to be continued to her during her life. Republics are not always ungenerous; nor are employers who reap vast fortunes by the labors of their servants always generous.

the "Curtis" well, but it soon filled with water and ceased to flow. The first permanent flowing well was situated on the Upper McElhenny Farm, and was completed in June, 1861, by Messrs. Phillip and Company. It was four hundred feet deep, and produced three hundred barrels per day for fifteen months, before it ceased to flow. The celebrated "Phillip's Well" was situated on the Tarr farm, and was completed November 14, 1861. It was a flowing well producing three thousand barrels daily, one day producing 3,940. The "Empire Well" produced the same amount. Wells were put down after August, 1859, as rapidly as the crude means of drilling them, and the remoteness from supplies, would permit. In September of that year crude oil brought twenty dollars a barrel in the oil region, but in November, 1861, it was only five cents, the lowest oil ever sold. In January, 1863, ten cents. This was due to the lack of facilities to transport it. After better facilities had been employed to get the crude oil to market the price arose, until July, 1864, it brought fourteen dollars a barrel.¹⁵

§7. In what countries petroleum found.

It is difficult to name all the countries in which petroleum has been discovered. It was known in ancient times that oil existed in the Echigo province of Japan, on the Japanese Sea. The springs there were called the "Evil Smelling Springs." Oil is still found in that province in great quantities. In Java there were in 1879 at least one hundred wells. In Borneo in 1899 was known a considerable field of oil, some of which was then worked. In Sumatra, in 1898, it was reported that the field was giving out. Oil is now produced in small quantities in Java and Ceram, and in Papua or New Guinea. In Burmah

¹⁵ In 1854 it sold for \$1 a gallon.

From 1859 to 1876 it has been estimated that 10,500 wells were drilled alone in Pennsylvania; and from a territory of an actual area of less than three miles on Oil Creek not less than \$110,000,000 of oil had been produced. In 1876 not over

500 barrels daily were taken out of the wells in Ohio and West Virginia. The two wells at Terre Haute, Indiana, in that year only produced 27 barrels per day. They were the only oil bearing wells in that State.

are ancient oil wells, and many wells on the Irrawaddy River are in active operation. Near the Bolan Pass in India petroleum was discovered in 1885; and at Sibi on the northwest frontier. It is also found in the Punjab regions, between Cashmere and Cabul, and in Assam. In Persia at Talish a petroleum spring has recently been discovered. On the eastern side of the Caspian Sea, on the Taman peninsula are vast deposits of oil; while on the western shore, immediately opposite, is the famous Baku district of Russia, once thought inexhaustible in both its oil and gas, but now showing signs of failure.¹⁶ On the shore of the Red Sea, at Djmsah, in the Orange Free State, in Madagascar (in small quantities), and in Algiers, of Africa, oil is found in considerable quantities. In New South Wales about eighty gallons of oil is now distilled from shale; and in South Australia a small amount of gas has been found. In Tasmania there is distilled from shale about forty-three gallons crude oil, about seven and one-half gallons petroleum spirit and 2,500 cubic feet of gas per ton. In New Zealand producing oil wells have been drilled. Wells exist at Baico, Tintea and Campina in Roumania, with a capacity in 1890 of 1,000 tons daily. Galicia is perhaps the greatest oil producing country of Europe. Oil is found in Turkey, Moldavia, Wallachia, Albania and Dalmatia, and near Piacenza and Veleja, Italy. As we have already seen, oil is found in Sicily, in the Ionian Islands, probably at Genoa and in Sardinia, though in small quantities. It is also found in Alsace,¹⁷ in the valley of the Rhine near the village of Schwat-

¹⁶ Described by Masudi, who died in 950.

"On the confines towards Geor-giana," says Marco Polo, "there is a fountain from which oil springs in great abundance, insomuch that a hundred ship loads might be taken from it at one time. This oil is not good to use with food, but 'tis good to burn, and is also

used to anoint camels that have the mange. People come from vast distances to fetch it, for in all countries round about they have no other oil." 1 Yule-Cordier edition of Marco Polo's travels (ed. 1903), p. 49. This was written about 1272, and describes the now famous Baku district.

¹⁷ Used in the eighteenth century.

willer, having been discovered as early as 1835; also in Hanover, at Luneberg heath, south of Hamburg, near Hölle, in the Dithmerschen, Schleswig-Holstein, at Lobsaun and Bechelbronn;¹⁸ and in very small quantities in South France near the Pyrennes. Oil has been drawn from a well near Edinburg, Scotland, for many years, and it is now distilled near Edinburg from shale; and we have already noted that it was known in Derbyshire, England, although in very small quantities. It has also been found at Worsley, at Wigan and West Leigh in Lancashire, and at Coalbrookdale and Wellington in Shropshire, but never in commercial quantities. At a place called Taranki, New Zealand, natural gas escapes from the ground. Oil is also found in the Hawaiian Islands. The oil lands of Peru are quite extensive in area, lying on the coast near the Pacific Ocean. It is likewise found in the Argentine Republic and in Bolivia, and there are indications of oil in Chile, Uruguay and Guiana. It is also found in great quantities in Ecuador, having been discovered by a priest in the eighteenth century. Near Tocuyo, Cap a dare and Curamichate, Venezuela, petroleum is likewise found. Small petroleum springs exist near Havana, Holquin and Mayri, of Cuba, in Santo Domingo, Trinidad and the Barbadoes. In Mexico are many oil wells of great capacity. We have already seen that oil exists in great amounts in Western Ontario; and gas has been piped in great volumes from that territory to Buffalo and Detroit. There is a small well near Gaspe, Quebec, but as late as 1897 it had not produced oil in paying quantities. The greatest oil field in the world, perhaps with the exception of the Baku district, was that of Western Pennsylvania. The fields of West Virginia, Kentucky, Ohio and Indiana have proven sources of great wealth; while Western New York, Eastern Tennessee, Louisiana, Texas and California have proven fine deposits of oil wealth. Variable quantities have been found in Michigan, Illinois, Missouri, Kansas, Indian Territory, Nebraska, Wyoming,

¹⁸ A deep shaft in search of oil was dug in 1735.

South Dakota, Colorado, New Mexico, Montana, Utah, Alaska, the Northwest Territory of Canada; and in Oklahoma are some of the richest oil fields in the United States. In the United States natural gas is found in New York, Pennsylvania, Ohio, West Virginia, Kentucky, Tennessee (in small amounts), Alabama (in very small amounts), Michigan (in quite small amounts), Indiana, Illinois, Missouri, Kansas, Oklahoma, Texas, Iowa (four shallow wells lighting three dwellings), North Dakota, South Dakota, Montana (small), Wyoming, Colorado, California, Oregon (only sufficient to provide light for two households) and Washington (one well only). Natural gas is also found in paying quantities in Ontario, Alberta and New Brunswick. In Italy in 1912 there was produced 6,800,000 cubic meters of natural gas, valued at \$57,128. The natural gas produced in England in 1914 was 87,000 cubic feet. It was taken from a well at Heathfield, Sussex County. In 1910 this well produced 262,000 cubic feet. No doubt in practically all oil producing areas in foreign countries natural gas is produced.

§ 8. Natural gas known to ancients.

In boring wells for salt the Chinese in the district Tsien Luon Tsing discovered natural gas in very early times. Some of the wells are two thousand feet deep. The gas in recent times has been used, not only for the purpose of evaporating salt water, but for domestic purposes. It was conveyed to the place of consumption by bamboo pipes. When a well became ignited, and could not be otherwise extinguished, they accumulated a body of water of considerable size and suddenly precipitated it upon the burning well. As early as A. D. 615, gas wells were known in Japan. At least six hundred years before the birth of Christ the Magi of Asia were worshippers of the eternal fires that blazed from fissures in the mountains on the coast of the Caspian Sea. The region of these fires was on the Apsheron peninsula, situated between the Caspian and Euxine Seas, where great de-

posits of petroleum have been found in recent years. The adherents of the parsees, a sect founded by Zoroaster, when they subjugated the tribes around the Caspian, adopted the fire-worship of the conquered. In A. D. 624 Heraclius proscribed their rites and destroyed their temple, ruins of which still exist; and twelve years later the country was conquered by the Mohammedans. Marco Polo describes this region in his travels, about 1272. At an early age burning gas was known in the vicinity of Genoa, Italy; and that city was formerly lighted with gas brought from the wells of Amiano or Miamo, in Parma. The famous "Fontaine Ardente," near Grenoble, France, was burning in the time of Julius Caesar, as it had for ages before. At Wigan, Lancashire, England, is a gas or "burning well."

§ 9. Early natural gas in America.

The early discoverers of petroleum in this country must have noticed escaping gas in connection with the petroleum; and a few of them make mention of that fact. In 1815, at Charleston, West Virginia, gas was obtained from a salt well; and as early as 1841 it was used in the evaporation of brine in the manufacture of salt. In 1821, at Fredonia, Chautauqua County, New York, a woman going to a spring after night for water set down her lantern, and the spring immediately took fire from it. Investigation showed that gas in considerable quantities was escaping at that place. The same year a well was sunk in that town, on the bank of Canadaway Creek, near the Main Bridge, Fredonia, and sufficient gas obtained for thirty burners. On the occasion of General Lafayette's visit to that town in 1824 the Taylor House, an inn or hotel, was illuminated by means of the gas obtained from this well. The well was only twenty-seven feet deep; and in a few years it burned out. In 1850 it was deepened to seventy feet. In 1858 a second well was bored, which furnished gas for two hundred burners. In 1871, a third was drilled to a depth of twelve hundred feet. As early as 1863

natural gas was used for manufacturing purposes at East Liverpool, Columbiana County, Ohio, and was used at an early date for lighting the streets, the use for that purpose probably being the first instance of the kind. In 1866 a gas well was bored near Kenyon College, Knox County, Ohio, six hundred feet deep. For several years the gas was allowed to escape, blazing fifteen feet high and three feet in diameter, before use was made of it. In 1854 the first gas well was bored (1,200 feet deep) in Erie, Pennsylvania; and at quite an early date gas was found in a well five hundred feet deep at West Bloomfield, New York, and which was piped to Rochester for illuminating purposes. In 1873 natural gas was used to light the town of Fairview, Pennsylvania; and the same year it was found flowing from the ground in the salt region above Marietta. In 1873 gas in great abundance was discovered on the Big Kanawha, above Charleston, and was used by the workmen to boil water and cook their dinners; and in the same year a well located in Armstrong County, Pennsylvania, furnished the first gas for a rolling mill. One year later a gas well of tremendous force was drilled at Murrys ville, Pennsylvania, twenty miles from Pittsburgh; and for three years the gas was allowed to escape, no effort being made to check its flow. In 1876 the town of Titusville, Pennsylvania, was supplied for the first time with gas flowing at the rate of four million cubic feet a day, from a well seven hundred and eighty-six feet deep; and the same year gas was brought from Butler County, nineteen miles, to Pittsburgh, for use in a rolling mill. About this time the value of natural gas began to be appreciated; but so universal was the belief that it was inexhaustible that little effort was made to husband it until at the end of the next fifteen or twenty years, when its decline became so pronounced that the warning could no longer be disregarded if the full benefit of its use was to be preserved. It is safe to say that wherever petroleum is found, natural gas will be found in at least small quantities.

In this country it has been found in abundance in Western Ontario, Western New York, Western Pennsylvania, West Virginia, Eastern Kentucky, Ohio, Indiana, Texas, Southeastern Kansas and Southern Oregon. Probably the famous Baku district has shown a greater display of natural gas energy and supply than any other quarter of the globe. Quite recently it has been discovered in Sussex, England, near London.

§ 10. Sources and composition of petroleum and gas.

The origin of petroleum and natural gas is still a controverted question and one of speculation—an unsolved problem. At least four theories have been advanced, and have their several advocates. (1) That they are the result of the distillations from the greatly abundant accumulations of palaeozoic seaweeds, the marks of which are still traceable in very many numerous instances in rocks. (2) That they are the result of the destruction of the innumerable multitude of coralloid sea animals, the skeletons of which make up a large part of limestone formations. (3) That they are the resultant of distillation of bituminous coal. (4) That they are, at least petroleum, referable in the language of Professor Orton, State Geologist of Ohio, “to peculiar decompositions chiefly of water and carbonic acid which are supposed to be carried on at considerable depths in the earth where these substances are brought into contact with metallic iron or with metallic bases of the alkalis at high temperature.”²⁰ The last two may be regarded as abandoned. In discussing the origin of petroleum and the several theories, Professor Orton advances the following argument: “They are most commonly referred to the agency of distillation. Destructive distillation consists in the decomposition of animal or vegetable substances at high temperatures in the absence of air. Gaseous and semi-liquid products are evolved, and a coke or carbon residue remains behind. The ‘high tem-

²⁰ Report on Oil and Gas, 1887, p. 9.

peratures' in the definition given above, must be understood to cover a considerable range, the lower limit of which may not exceed 400 or 500 degrees F. Petroleum and gas on the large scale are not the products of destructive distillation. If shales, sandstones or limestones holding large quantities of organic matter, as they often do, and buried at a considerable depth, should be subjected to volcanic heat in any way, there is no reason to doubt that petroleum and gas would result from this action. Without question, there are such cases in volcanic districts, but the regions of great petroleum production are remarkably free from all igneous intrusions, and from all signs of excessive or abnormal temperatures. All claims for an igneous origin of these substances are emphatically negatived by the condition of the rocks that contain them. There is a statement of the distillation theory that had attained quite wide acceptance, which needs to be mentioned here. It is to the effect that these substances, oil and gas, have resulted from what is called 'spontaneous distillation at low temperatures,' and by low temperatures ordinary temperatures are meant. It does not, however, appear on what facts in nature or upon what artificial processes this claim is based. Destructive distillation is the only process known to science under the name of distillation which can account for the origin of oil or gas, and this does not go on at ordinary or low temperatures. A process that goes on at ordinary temperatures is certainly not destructive distillation. It may be chemical decomposition, but this process has a name and place of its own, and does not need to be masked under a new and misleading designation, such as spontaneous distillation. No help can come to us, therefore, from the adoption of the spontaneous distillation theory. It seems more probable that these substances result from the primary chemical decomposition of organic substances buried with the forming rocks, and that they are retained as petroleum in the rocks from the date of their formation. It is true that our knowledge of these processes is inadequate, but there are many facts

on record that go to show that petroleum formation is not a lost art of nature, but that the work still goes on under favorable conditions. It is very likely true that, as in coal formation, the conditions most favorable for large production no longer occur, but enough remains to show the steps by which the work is done. The 'spontaneous distillation' theory has probably some apparent support in the fact that must be mentioned here, viz: that where petroleum is stored in a rock, gas may be constantly escaping from it, constituting in part, the surface indications that we hear so much of in oil fields. The Ohio shale, for example, is a formation that yields along its outcrops oil and gas almost everywhere, but no recent origin is needed for either. The oil may be part of a primitive store, slowly escaping to the day, and the gas may be constantly derived from the partial breaking up of the oil that is held in the shales. The term 'spontaneous distillation' might, with a little latitude, be applied to this last named stage, but it has nothing to do with the origin of either substance. While our knowledge of the formation of petroleum is still incomplete and inadequate, the following statements in regard to it are offered as embodying the most probable view:

1. Petroleum is derived from vegetable and animal substances that were deposited in or associated with the forming rocks.

2. Petroleum is not in any sense a product of destructive distillation, but is the result of a peculiar chemical decomposition by which the organic matter passes at once into this or allied products. It is the result of the primary decomposition of organic matter.

3. The organic matter still contained in the rocks can be converted into gas and oil by destructive distillation, but so far as we know, in no other way. It is not capable of furnishing any new supply of petroleum under normal conditions.

4. Petroleum is, in the main, contemporaneous with the

rocks that contain it. It was formed at or about the time that these strata were deposited."

William T. Brannt, in his work on Petroleum, written in 1894, which is based upon the German work of Professor Hans Hoefler and Dr. Alexander Veith, gives the following conclusions²¹ as the result of his researches:

1. "Petroleum is of animal origin; saurians, fishes, cuttle-fishes, coralloid animals, etc., especially have authentically contributed to its formation, though soft animals without solid frame, of which no authentic, determinable remains are left behind, may also have co-operated. While coal has been formed by the transformation of vegetable substances, petroleum and the allied bitumens originated from animal substances.

2. "It is still an unsolved problem whether petroleum could be formed from animal remains only under special conditions; neither is the nature of these conditions known.

3. "Petroleum has been formed in all ages of the earth's history of which animal remains exist. The Archaean strata are free from petroleum.

4. "Petroleum could accumulate and be preserved in the original deposit only, if during its formation it was shut off from escape.

5. "The formation of petroleum has been effected without the co-operation of an uncommonly high temperature, and,

6. "It has taken place under high pressure, the influence of which upon the chemical process is not known.

7. "The deposits of petroleum are partially original (primary) and partially secondary; the latter may be or were connected with the former.

"Concerning the formation of natural gas the same materials and similar processes as for the formation of petroleum may be presupposed. The accumulation of both also took place in the same spaces, frequently in such a manner that the gas oc-

²¹ Brannt on Petroleum, 163.

cupied the higher, and the oil the lower sections of the same rock stratum. No process being known by which petroleum can be formed from natural gas, while the separation of the latter from the former—even at the ordinary—is a well known fact, it is very probable that petroleum is the primary and gas the secondary product.”

§ 10a. In what kind of strata, rock or sand oil is.

“In classifying lands as to their probable content of oil and gas it must be borne in mind that oil and gas are mobile substances and that, owing to their mobility and to the resulting increased importance of gravitation, temperature, hydrostatic pressure, and capillarity, it is necessary to make certain variations from the type of procedure employed in classifying lands containing coal, phosphate, or other stable minerals. The mobility of oil and gas has, in many regions, permitted their migration through varying thicknesses of pervious strata to their present places of accumulation, so that the problem is not to discover where the hydrocarbons originated, but rather where they have accumulated.

The present position of these accumulations depends mainly on the character of the strata, the attitude of the strata (commonly spoken of as the rock structure), the presence or absence of water, and the character and specific gravity of the oil. The fluid hydrocarbons do not, as is supposed by some, occupy underground lakes or reservoirs surrounded by walls of rock. Instead they saturate porous rocks in places where the geologic structure, the conditions with regard to underground water, and the succession of strata are such that the accumulations are sealed by relatively impervious beds. Thus, although the accumulations of oil or gas are called “pools,” they are not to be confused with such pools as are formed by the collection of liquids upon the surface of the ground. The porous stratum in which the hydrocarbon collects is often spoken of as an oil or gas “sand,” although it may in reality be sandstone, gravel, limestone, or a zone of fractured rock. Into this “sand” the hydrocarbon comes from one or another source, but if there is to be an accumulation of importance the migration of the oil or gas along this pervious bed must be stopped by a change in dip or by some other obstacle

to continued progress, and, in addition, the reservoir thus formed must be sealed by strata that are relatively impervious, such as compact shales, clays, or fine-grained sandy beds saturated with water.

The accumulations within the United States may be divided roughly into three classes, as indicated below.

1. Those occurring in strata of sandstone or limestone bounded above and below by rocks comparatively impervious to oil. The sandstone or limestone may be of broad or of very narrow extent, in some places comprising merely small lenses of porous material embedded in relatively impervious rocks, in others underlying hundreds of square miles of territory in comparatively regular beds. To this class belong the greater number of oil accumulations of this country.

2. Those occurring in porous strata, apparently lenticular, associated with the "salt domes" of the Gulf Coastal Plain.

3. Those occurring in fissures in shale, as in the Florence field of Colorado. The fracturing of other rocks, such as limestone and sandstone, affords favorable conditions for the accumulation of oil; but sandstone and, under certain conditions, limestone are capable of storing oil without fracturing, the fracturing merely increasing their capacity. A fine-grained shale, on the contrary, although capable of containing oil, does not permit its migration through the rock mass with sufficient rapidity for collection in wells unless the shale is broken by fissures, which serve as channels or reservoirs for the slowly migrating oil.

It may be stated as a fundamental principle that important accumulations of petroleum and natural gas are to be found only in stratified or sedimentary rocks. Regions in which the strata have been greatly disturbed or altered by intrusions of igneous rock are, as a rule, unfavorable to the accumulation of petroleum, because the attendant heat and fracturing would as a rule have had disastrous effects on volatile substances of this character. An interesting apparent exception has been noted in Ventura County, Cal., where oil to the extent of five or six barrels a day has been obtained from wells drilled in close-textured crystalline schist. Although the schist is underlain by granite, it is overlain at a distance of only a few hundred feet from the wells by Tertiary rocks which in the same general region are petroleum bearing. These relations suggest that the presence of the oil in

the schist is due to infiltration from the Tertiary sediments through fractured zones rather than to origin in the sediments that were metamorphosed to form the schist.

In general, then, oil is found in sedimentary strata of greater or less extent and regularity. These strata were originally deposited by water in the ocean, in fresh-water lakes, or on great deltas practically at sea level. The beds were therefore horizontal, or nearly horizontal, as first laid down, and where a series of beds was deposited one above another, there being no earth movement during the deposition, the several beds were parallel. After the beds of sand, mud, and marl were deposited and hardened into the resulting sandstone, shale, and limestone, they were in certain areas bent by earth movements into folds of various shapes, and it is about these folds that the accumulations of oil are found. The attitude in which the rocks lie, the shape of the folds, and the presence of faults or breaks in the strata constitute the rock structure.

In any consideration of the factors which control the accumulation of oil or gas the importance of the part played by the structure can hardly be overestimated. The fluid contents of porous beds obey the laws of gravitation and capillarity, separating and distributing themselves in the main in accordance with their specific gravities. If water, petroleum, and gas are, as is usual, present in petroliferous beds, the gas would as much as possible disengage itself from the fluid and rise to the highest point in the fold, while the water would endeavor to displace the petroleum and find a resting place as low down as possible. If the bed of rock is inclined and the water is under artesian pressure, it will be forced upward along the bed, the oil remaining above the water because of the difference in specific gravity. If the porous bed is continuous in dip to the outcrop, the gas and oil are likely to exhaust themselves at the outcrop in the form of seeps. If, however, the progress of the hydrocarbons up the dip is stopped by a fold in the bed, or by a fault which seals instead of opening the stratum, or by saturation of the bed with water, an accumulation takes place, the oil and gas remaining between the water down the dip and whatever has impeded their progress up the dip. This theory, which is known as the anticlinal theory, is in some form now accepted by practically all geologists, not as indicating absolutely the limitations of the

occurrence of oil and gas, but as expressing the general relations of their occurrence to geologic structure, subject to various modifying conditions. Other factors less well understood enter into the problem, such as the difference in the capillary attraction exerted between water and the rock particles and between oil and the rock particles and the differences in friction experienced by the two fluids in passing through the rock. There is much to be learned concerning the whole problem, but enough is known to make the study of any oil field of economic as well as scientific value.

If the rock containing the oil does not also carry water there is no force to impel the oil into the upfold or anticline. On the contrary, gravity tends to pull it downward and it collects in the adjoining downfold or syncline. This condition is found in some of the Pennsylvania fields.

Where the migration of oil is due to the pressure of dissolved or occluded gas in the absence of water saturation the oil will move in all directions until it is stopped by some impervious stratum, where accumulation takes place in apparent disregard of structure.

The simplest structure favorable to the accumulation of oil and gas is that of a symmetrical anticline having little or no pitch of the axis and moderately dipping flanks. If the requisite condition of porous oil-bearing rock adequately sealed by impervious beds is fulfilled and the strata are impregnated with water under moderate hydrostatic pressure, the hydrocarbons will, under ideal conditions, segregate in the axis of the fold and extend down the flanks a distance dependent on the quantity present. Farther down the flanks and in the troughs of the corresponding synclines water will as a rule be found. It is evident that, other things being equal, the extent of the productive area controlled by anticlinal structure is greater where the fold is broad and the dip of the strata on the flanks relatively low than where the fold is narrow and has steep flanks, for in the former case the gathering ground for oil and gas is much greater than in the latter. From the simple symmetrical anticline there are gradations on the one hand into domes pitching away from a central point and on the other hand through unsymmetrical folds to an extreme type in which one flank is vertical or overturned. In every symmetrical fold the boundary between an oil

pool lying at the top of a fold and extending part way down the sides of the fold and the water saturating the rocks farther down is an approximately horizontal line, because as long as the fold is regular the water tends to rise to the same level all along it. If, however, there are minor irregularities on the sides of the fold these have their effect on the distribution of the oil, making the margin of the pool irregular or causing small pools to collect along the slope.

Structural features of other types are under certain conditions favorable for the accumulation of petroleum and natural gas. Among these may be mentioned monoclines, which present conditions favorable for the concentration of oil wherever there is a change in the rate of dip or an abrupt change in the strike of the rocks, shallow synclines where water is absent from the oil-bearing zone, and synclines where the oil and water are of nearly the same gravity. Unconformities where steeply dipping petroliferous strata are overlain by relatively impervious horizontal or nearly horizontal beds are also favorable. Faults are usually considered wholly unfavorable to the accumulation of oil and gas, and for areas where the dislocations are many and extensive this view is undoubtedly correct. However, in many places faults have quite the contrary effect. For instance, strike faults may cause a greater concentration of petroleum toward the crest of a fold, and dip faults in a series where there are many oil sands may bring about communication between the different sands and have a notable effect on local production. In a series of uniformly dipping beds an oil sand which would normally crop out at the surface may be cut off by a strike fault and sealed beneath impervious beds and thus retain oil which would otherwise migrate to the surface and be dispelled. Moreover, faulting may produce fractured zones along which the oil or gas can migrate and in which it may collect. In a number of localities, as in some of the fields in Mexico, where intrusive dikes have pierced oil-bearing strata and consequently arrested the movement of the oil in certain directions, the petroleum has accumulated in apparent disregard of the structural features of the sedimentary series.

In many fields there is little or nothing at the surface to indicate the presence of valuable hydrocarbons below, but in many other fields there is ample indication of oil at the surface. The

oil-bearing stratum itself may crop out and the oil ooze from it, giving to the rock a dark, greasy appearance and the odor of petroleum, or the oil may find its way to the surface from the oil pool below through some fracture of the overlying rock. Water charged with various salts or with sulphur may rise with the oil, so that a spring is formed, the oil floating as a brown scum on the surface of the water or in smaller quantity producing the brilliant iridescent sheen characteristic of petroleum. Gas may find its way to the surface and appear in "gas springs" or under certain conditions may produce the phenomenon of mud volcanoes. The place at which oil has come to the surface and evaporated through long periods of time may be marked by a deposit of asphaltum. In certain localities oil-bearing shales have been burnt to a pink or deep brick-red color or altered to a hard vesicular rock resembling scoriaceous lava. This metamorphism is due to the burning of the hydrocarbons that have impregnated the rock, and the presence of such rock therefore becomes an important surface indication of petroleum.

The stratigraphic occurrence of hydrocarbon minerals in the United States is by no means limited; on the contrary, petroleum in the solid, liquid, or gaseous form is found in greater or less quantity throughout the range of strata from the Cambrian to the younger members of the Tertiary series.

In general, the commercially important accumulations of oil throughout the central and eastern portions of the United States are found in strata belonging to the Paleozoic era. In the great Appalachian field, which extends from the southern portion of New York along the western slope of the Allegheny Mountains to northern Tennessee, the accumulations of oil occur in strata ranging in age from early Devonian to late Carboniferous. In Ohio and Indiana petroleum is derived chiefly from rocks of Ordovician age, and in Indiana mainly from Carboniferous strata. In the Mid-Continent field, which embraces Missouri, Kansas, and Oklahoma, the petroleum has accumulated in rocks of the Pennsylvanian and Permian series. In the Gulf field, which includes the Coastal Plain of Louisiana and Texas, the petroleum-yielding rocks are Mesozoic and Cenozoic in age, being assigned in part to Cretaceous and in part to Tertiary formations.

In the Rocky Mountain fields the productive formations range in age from late Paleozoic to late Mesozoic. The Wyoming fields

present perhaps the greatest range of occurrence, yielding oil from strata belonging to the Carboniferous, Triassic, Jurassic, and Cretaceous systems. The Colorado and New Mexico fields thus far developed obtain their oil from strata included entirely within the Cretaceous, and the small quantity of oil produced in Utah is derived from rocks assigned to the Carboniferous system, although indications of oil are found at certain localities in the Jurassic and Cretaceous rocks.

In the Pacific coast region the important accumulations of oil are found chiefly in Cenozoic rocks, although in certain fields an output of local importance is obtained from late Mesozoic rocks. In Ventura County, Cal., the principal oil-yielding formations are classed as Tertiary and range in age from Miocene to Pliocene. Along the west side of the San Joaquin Valley the range is greater, the oil extending downward into the upper members of the Cretaceous system. In the Kern River field, on the east side of the San Joaquin Valley in Kern County, oil is obtained from rocks of late Miocene or Pliocene age. In Santa Barbara County the oil is derived chiefly from early Miocene rocks. In portions of Oregon and Washington small amounts of oil and gas have been obtained from rocks assigned to the Eocene and Miocene series.

Despite this wide distribution of fluid hydrocarbons the conclusion does not necessarily follow that accumulations of asphaltum, oil, or natural gas may be found in any area of sedimentary rocks, for such accumulations take place only where all the essential conditions governing origin, adequate storage facilities, and favorable structure are fulfilled."(a)

§ 11. Composition of petroleum.

Naturally petroleum taken from different quarters of the world will vary in composition, but, in general, it may be said, it is a mixture of several hydrocarbons, and to contain also bituminous materials, sulphur, carbonaceous matter, sand and clay.²² The following table of the result of refining crude pe-

(a) Taken from U. S. Bulletin 537, 1913, on "The Classification of Public Leads," prepared by George Otis Smith and others; a very valuable pamphlet full of information

for those developing and producing petroleum and natural gas.

²² 9 Pop. Sci. Mon. 140; Crew on Petroleum, 165.

roleum was made as early as 1866; but it should be remembered that oil even from the same region will not always produce identical results. We give the table:

Gasoline	3	per cent.
Naphtha	10	"
Benzine	3	"
Illuminating Oil	75	"
Residuum	4	"
Coke and Loss	5	"
		<hr/>
		100 "

A distinguished Russian chemist, Ludwig Nobel, has given the following as the result of refining crude petroleum taken from the Baku district:

	Benzine (light oil).....	1	per cent.	
	Gasoline	3	"	
Lubricants	{	Kerosene (burning oil).....	27	"
		Saliaroni	12	"
		Veregenni	10	"
		Lubricating	17	"
		Cylinder	5	"
		Vaseline	1	"
		Liquid fuel	14	"
	Lost in refining	10	"	
		<hr/>		
		100	"	

The following table is taken from S. F. Peckham's Report on Petroleum (page 165) of the average percentages of commercial products obtained from crude petroleum from New York, Pennsylvania, Ohio and West Virginia:

Gasoline	1.5	per cent.
C — naphtha	10.0	"
B — naphtha	2.5	"
A — naphtha	2.5	"
Illuminating Oil	54.0	"
Lubricating Oil	17.5	"
Paraffin	2.0	"
Coke and Loss	10.0	"
		<hr/>
		100.0 "

§12. Composition of natural gas.

Analyses of natural gas will necessarily differ, varying with the locality from which it is drawn. In the following table, prepared prior to 1888, one per cent. is unaccounted for, it will be noticed:

Marsh Gas	67	per cent.
Hydrogen	22	"
Ethylhydride	5	"
Nitrogen	3	"
Carbonic Acid	0 6/10	"
Carbonic Oxide	0 6/10	"
Oxygen	0 8/10	"
<hr/>		
	99	"

An analysis of the natural gas of Fredonia showed the following results:

Nitrogen	9.54	per cent.
Carbondioxide	0.41	"
Hydrocarbons of the paraffin series.....	90.05	"
<hr/>		
	100.00	"

Another analysis of Murrysville gas produced the following results:

Nitrogen	2.02	per cent.
Carbondioxide028	"
Oxygen	trace	
Paraffins	97.70	"
<hr/>		
	100.00	"

Several analyses by Bunsen and Schmidt of the Caucasus natural gas give the following results:

Methane	92.49	93.09	92.24	97.57	95.56
Olefines	4.11	3.26	4.26	—	—
Carbonmonoxide	0.93	2.18	3.50	2.49	4.4
Hydrogen	0.94	0.98	—	—	—
Nitrogen	2.13	0.49	—	—	—

§13. Early attempts at distilling or refining petroleum.

As early as 1694 patents were granted in England for making "pitch, tar and oyle out of a kind of stone." In 1781 the Earl of Dundonald obtained oils from coal by the same process. As early as 1840 "coal oil," properly called, was distilled in France from bituminous shale. During the next ten years hundreds of experiments were made to successfully distill oil from coal and bog peat. E. W. Binney, the geologist, of Manchester, England, about 1847 called attention to the petroleum found at Riddings, near Alfreton in Derbyshire. The same year a patent had been granted to one Mansfield for "the improvement in the manufacture and purification of spiritous substances and oils applicable to the purposes of artificial light." James Young the same year began the distillation of a substance which he called "petroleum peat"; and three years later he and Binney having discovered a highly bituminous coal at Boghead, Scotland, established works for the purpose of distilling oil from it, and conducted them on an expensive scale for fifteen years. Several years after Binney had called attention to the petroleum at Riddings, he and James Young commenced the manufacture of illuminating oil from it, but the supply soon giving out, they began distilling oil from boghead peat, as above stated. Refineries to distill oil from coal were soon established in America under the English patents, which were taken out in this country in 1856, but afterwards overthrown by the courts as illegal. In 1851 petroleum on Oil Creek, Pennsylvania, was selling for seventy-five cents a gallon. It was tested by Messrs. Williams, Luther Atwood and Joshua Merrill at the United States Chemical Manufacturing Company's works at Waltham, near Boston, and very satisfactory results obtained; but the supply being very limited, little effort was made to manufacture and put it on the market. Small quantities of it, however, were put upon the market in 1852 and called "Coup-Oil," after the *coup d'état* of Louis Napoleon. It was used as a lubricating oil. As early as 1855 petroleum was refined and offered for sale at Pittsburgh; but as the quantity was small, a market in that city was found for

the entire amount of the output. The manufacture created a demand for the crude product. In 1856 Joshua Merrill first made an illuminating oil from Trinidad bitumen. In 1853 George H. Bissell, having seen a bottle of crude petroleum in the office of Professor Crosby of Dartmouth College, that had been sent to him, as a curiosity by Dr. Brewer of Titusville, Pennsylvania, taken from the banks of Oil Creek, procured another bottle of it directly from that region, and submitted it in the spring of 1855 to Professor Benjamin Silliman, Jr., the eminent chemist of Yale College, who made a report upon it April 16, 1855, that has become a classic in the history of petroleum.²³ From that moment the success of distilling illuminating oil from crude petroleum was established, and refineries began to spring up as soon as the supply warranted their construction and the process of refining became known. One of the earliest was situated on Hunter's Point, Long Island, and probably the most celebrated at Bayonne, New Jersey.²⁴

§14. Early use of petroleum as a medicine.

The first use made of petroleum was as a medicine. The Indians of Western New York mixed it with clay and smeared or painted their faces with the mixture, producing a hideous effect. It was gathered by the whites and sold as a medicine, as already stated. It was sold under the name of Seneca Oil, American Oil, afterward as Harlem Oil. About 1849, Mr. Samuel M. Kier of Pittsburgh conceived the idea of putting it in bottles and selling it as a specific for all the ills to which flesh is heir. He procured a few barrels from his father's salt wells in Allegheny County, and placed upon the bottle the following label or advertisement:

"Kier's

Petroleum or Rock Oil, celebrated for wonderful curative powers. A natural remedy. Procured from a well in Allegheny Co., Pa. four hundred feet below the Earth's

²³ See Henry's History of Petroleum for this report.

²⁴ The name "Kerosene" took its name from the celebrated Downer

Kerosene Works, located at Boston. The term "Kerosene" was a trade mark. Crew on Petroleum, 136.

surface. Put up and sold by Samuel M. Kier, 363 Liberty Street, Pittsburg, Penn.

Price 50 cents."

He sold three barrels a day; but in three years the demand for it having declined, he turned his attention to distilling the crude oil and in a measure was successful. "Barbados Tar" was another production of petroleum used as a medicine. At the present day valuable medicinal products have been made from petroleum, such as filtered paraffin residues sold under the names of cosmoline, vaseline, petroline, and the like.

§15. Transportation.

In Asia petroleum is transported in the most primitive manner when not by water. In the Baku district it was transported in casks placed above and slung under the axle of a two-wheeled cart, the wheels often being seven feet in diameter. When oil was first discovered on Oil Creek, Pennsylvania, the only means of carrying it out of that region was by the use of wagons to haul it to navigable streams of water. As the quantity to be transported soon became very great, hundreds of wagons were in use, resulting in bringing about a condition of the country dirt roads scarcely without parallel. The demand for transportation was greater than the supply resulting in very high prices, as high as three dollars a barrel being charged for hauling a barrel four miles. Many a wagoner laid up a comfortable sum for the future. The oil was at first placed in barrels that cost \$3.50 apiece, a barrel that today in that region would not cost over one dollar. These barrels were made of heavy oak staves, hooped with iron, and coated on the inside with glue; but as the crude oil had in it some water, the glue coating did not prove a complete protection, and the loss through leakage was very considerable. Oil Creek and Allegheny River were the only channels through which petroleum could be carried to a market. On reaching the creek the barrels were placed on rafts and floated down to the Allegheny, if the supply of water would permit it. The expedient of damming the stream at a number of places and releasing the water suddenly

was adopted. Often the accumulations of these rafts or boats were many, and when the pond-freshets came and the boats were turned loose in the stream, there being no means of controlling them, the loss was at times very great, arising from confusion and frequent collisions and wreckages. At one time the loss was estimated at from 20,000 to 30,000 barrels. The empty boats were towed up the stream again by horses, driven along the banks of the creek, but more frequently in its bed or channel. At Oil City the barrels were transferred to boats and steamers. At one time more than one thousand boats and thirty steamers were engaged in the oil traffic at this place, resulting in frequent collisions and jams, to the great loss of shippers. During a freshet in May, 1864, the loss was over 25,000 barrels. Bulk barges were soon introduced on the Allegheny and Ohio Rivers, but as they frequently careened, because of the oil shifting, the loss was considerable. To remedy this, the oil space was cut into apartments or rooms, to prevent the shifting. The railroads early saw their opportunity, and entered the oil region. During the latter half of the year 1865 they introduced the tank car. At first they took an ordinary flat car, placed upon it two tanks of four thousand gallons each, and securely fastened it down. In 1870 or 1871 tanks of boiler iron were introduced, which have continued in use until the present day, cars being purposely constructed for them. Transportation of so bulky a product as crude oil by means of wagon and rafts and the use of barrels was evidently too expensive; and as early as the autumn of 1860 S. D. Karns of Parkersburg, West Virginia, suggested the practicability of transporting it in pipes laid on or in the ground. In 1862 J. L. Hutchinson ran a line of pipe on the celebrated Tarr farm over a high hill to the first refinery in the oil region, depending upon the principle of a syphon to carry the oil; but the line was a failure. In 1863 he laid a pipe line from the famous Sherman well to the terminus of the railroad on the Miller farm, a distance of three miles, depending upon hydraulic pressure; and although one thousand barrels were emptied into the line at its beginning, only fifty reached their destination. Pumps were resorted to, but on account of the inadequacy of the pipe

joints, the loss of the oil was too great to transport it in this manner. After a trial of two years the line was abandoned. In 1865 Samuel Van Syckle, by joining the pipes with screw and thimble, laid a line from the Miller farm to Pithole, a distance of four miles. The pipe was laid two feet in the ground; and the ascent from the farm to Pithole was six hundred feet. By the application of pumps oil was easily delivered at Pithole. This was the first successful pipe line. The teamsters realized that their business was seriously threatened; and they did just what the half-civilized oil haulers of the Baku district did when the Nobel Brothers first introduced a pipe line in that district — they tore up the line and broke it in pieces as fast as he could lay it. He placed armed watchmen along the entire line, just as was afterwards done in the Baku district; and after many sanguinary conflicts with the teamsters, maintained his pipe line. A second line was completed the next Spring, running from Benninghoff to the Shaffer farm. As early as 1877 there were ten pipe lines in the oil region. The construction of the long distance lines was begun in 1880, and several were extended until they reached the sea-board, one even passed through Central Park in New York City at Sixty-fourth street, in order to reach the refinery on Hunter's Point, Long Island. There are now many hundred miles of pipe lines in use in the United States. In Russia their use is very common. Oil is shipped to foreign countries by steamers especially built for that purpose, having their holds cut into many apartments to prevent the oil shifting and sinking the vessels. Some of these steamers carry over one and a half million gallons. This method of transportation has been in use many years on the Caspian Sea.

§16. The first oil lease.

We give, as a curiosity, a copy of the first oil lease. The spring leased was situated in the famous Oil Creek region of Pennsylvania:

"Agreed this fourth day of July, A. D. 1853, with J. D. Angier of Cherrytree Township, in the County of Venango, Pa., that he shall repair

up and keep in order the old oil spring on land in said Cherrytree Township, or dig and make new springs, and the expenses to be deducted out of the proceeds of the oil, and the balance, if any, to be equally divided, the one-half to J. D. Angier and the other half to Brewer, Watson & Co., for the full term of five years from this date. If profitable.

“BREWER, WATSON & Co.

“J. D. ANGIER.”²⁵

§17. Early use of artificial illuminating gas.

The earliest known use of artificial gas for illuminating purposes was in 1787 when Lord Dundonald of England obtained gas from coal tar, and occasionally used it for lighting up the hall of Culross Abbey. In 1792 William Murdoch, residing at Redruth, Cornwall, succeeded in demonstrating that an illuminating gas could be obtained from coal; and in 1797 publicly showed his system as he had matured it. One year later he was employed in the famous Soho workshop of Boulton and Watt, located at Birmingham, England; and he fitted up an apparatus in that establishment for the manufacture of gas, with which it was partly lighted. Shortly after his apparatus was extended and gas manufactured for other establishments of that manufacturing city. In 1801 M. Lebon of Paris introduced into his house gas distilled from wood. Through the efforts of F. A. Winsor of London, the Lyceum Theatre of that city was lighted with gas in 1803. The first employment of gas for street lighting was January 28, 1807, when Pall Mall, London, was lighted. In 1810 Parliament passed an Act authorizing the incorporation of a gas-light company; and two years later the first gas-light company was incorporated, called the “Chartered Gas-light and Coke Company.” Westminster bridge was lighted with gas in 1813, for the first time; and the next year the streets of Westminster. In 1816 London was lighted with it; and so rapidly did it advance that by 1820 many of the principal cities of the kingdom, as well as Paris and some other cities on the Continent, were lighted by its use. It was used in many large workshops and public buildings. It found its way into private houses very slowly; one of the rea-

²⁵ Henry's History of Petroleum, 60.

sons for its slow progress arose from the annoyance occasioned by it escaping from ill-fitted pipes, and the other, and perhaps justly so in a large measure, from apprehension of the danger attending its use. By 1829 there were 200 gas works in Great Britain. In the United States gas was first used for lighting in Newport, Rhode Island, in 1806, David Melville making and using it in his house and in the street in front of it. In 1813 he took out a patent on its manufacture, and lighted several large factories. Four years later his process was applied to Beaver Tail light-house, that being the first instance where gas was used in a light-house lantern. In 1816 an attempt was made to manufacture gas for lighting purposes in Baltimore, but the attempt was a failure, and success was not attained until 1821. The next year it was introduced into Boston. In 1823 the New York Gas-light Company was formed, but because of the little demand for gas it did not begin active operations until 1827. Three years later, success having been assured, the Manhattan Company was organized, which entered the field as a competitor of the New York Company. Until 1849 both companies made their gas from oil or rosin. Gas was not introduced into Philadelphia until 1835. From 1824 to 1828 the New York Gas-light Company manufactured gas from oil exclusively, and sold the product at \$10 per 1,000 feet. The gas manufactured by this company from rosin from 1828 to 1848 was sold by it at \$7 per 1,000 feet. Wood gas was used at the Philadelphia gas works as late as 1856.

CHAPTER II.

LEGAL STATUS OF OIL AND NATURAL GAS.

- § 18. Oil and natural gas a mineral.
- § 19. Part of realty.
- § 20. Ownership in earth.
- § 21. Compared with animals *ferae naturae*.
- § 22. When title vests in owner.
- § 23. Ownership of oil differs from that of water.
- § 24. Owner of land has only a qualified ownership.
- § 25. Qualified ownership in oil.—Power of legislature.
- § 26. Depriving owner of right to oil and gas beneath surface.
- § 27. Severance of oil or gas from realty.
- § 28. Recovery of severed product.—Trover.
- § 29. Ejectment for possession.
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- § 31. Increasing flow of gas by pumping well.
- § 32. Pumping oil wells.
- § 33. Exploding nitroglycerin in well to increase flow.
- § 34. Maliciously boring well to injure another.
- § 35. Measure of damages for unlawfully taking oil and gas from the soil.
- § 36. When lessee acquires title to oil.
- § 37. Waste.—Part of realty.—Reservation.
- § 38. Partition.
- § 39. Oil and gas not synonymous.
- § 40. "Other valuable volatile substances."
- § 41. Natural gas not heat.
- § 42. Gas and oil an article of commerce.
- § 43. Judicial notice.
- § 44. Judicial knowledge of oil and gas properties.
- § 45. Plugging wells.
- § 46. Not subject to tariff law of 1890.
- § 47. Entry of government oil lands.
- § 48. Property in oil tanks or pipe lines.—Larceny.

§ 18. Oil and natural gas a mineral.

Whatever may have been thought of oil or natural gas at one time,¹ it is now established beyond any question that oil or petroleum and natural gas are minerals, and judicially must be so treated.² Whether or not natural gas is a mineral was presented in a Canadian case, and ably discussed. The question arose on the construction of a section of the Municipal Act. The clause construed was as follows: "The corporation of any township or county, wherever minerals are found, may sell, or lease, by public auction or otherwise, the right to take minerals found upon or under any roads over which the township or county may have jurisdiction, if considered expedient to do so." The question was whether this sentence covered natural gas, and it was decided that it did.³ It was also held that this statute au-

¹ *Dunham v. Kirkpatrick*, 101 Pa. St. 43.

² *Murray v. Allard*, 100 Tenn. 100; 43 S. W. Rep. 355; 39 L. R. A. 249; 66 Am. St. Rep. 740; *Kelley v. Ohio Oil Co.*, 57 Ohio St. 317; 49 N. E. Rep. 399; 39 L. R. A. 765; 63 Am. St. Rep. 721, affirming 6 Ohio C. Ct. Dec. 470; 9 Ohio C. C. 511; 34 Wkly. L. Bull. 185; *Wilson v. Youst*, 43 W. Va. 826; 28 S. E. Rep. 781; 39 L. R. A. 292; *Funk v. Haldeman*, 53 Pa. St. 229; *Thompson v. Noble*, 3 Pittsb. 201; 17 Pittsb. L. Jr. 45; *Stoughton's Appeal*, 88 Pa. St. 198; *Roberts v. Jepson*, 4 Land Dec. 60; *Piru Oil Co.*, 16 Land Dec. 117; *Ontario Natural Gas Co. v. Gosfield*, 18 Ont. App. 626; 38 Am. and Eng. Corp. 253; *Brown v. Spillman*, 155 U. S. 665; 15 Sup. Ct. Rep. 245; *People's Gas Co. v. Tyner*, 131 Ind. 277; 31 N. E. Rep. 59; 16 L. R. A. 443; *Hail v. Reed*, 15 B. Mon. 479; 11 Morr. Min. Rep. 103;

Hughes v. United Lines, 119 N. Y. 423; 23 N. E. Rep. 1042; *Westmoreland, etc., Co. v. DeWitt*, 130 Pa. St. 235; 18 Atl. Rep. 724; 5 L. R. A. 731; 29 Amer. L. Reg. 93; *Given v. State*, 160 Ind. 552; 66 N. E. Rep. 750; *Poe v. Ulrey*, 233 Ill. 56; 84 N. E. Rep. 46; *Watford Oil & Gas Co.* 233 Ill. 9; 84 N. E. Rep. 53; *Kansas Natural Gas Co. v. Haskell*, 172 Fed. Rep. 545; *United States v. McCutchen*, 234 Fed. 702; *McLemore v. Express Oil Co.*, 158 Cal. 559; 112 Pac. 59; 139 Am. St. 147; *Rumsey v. Sullivan*, 166 N. Y. App. Div. 246; 150 N. Y. Supp. 287 (affirming judgment on rehearing 164 N. Y. App. Div. 911; 148 N. Y. Supp. 1142); *Osborn v. Arkansas, etc., Gas Co.*, 103 Ark. 175; 146 S. W. 122; *McIntosh v. Ropp*, 233 Pa. 497; 82 Atl. 949.

³ *Ontario Natural Gas Co. v. Smart*, 19 Ont. Rep. 595.

thorized the leasing of a highway for the purpose of drilling for gas.⁴ A grant in general terms "of all the minerals in a tract of land, *prima facie*, includes the oil and gas as well as the solid minerals, such as coal; but is sometimes susceptible of an interpretation that excludes them."^{4a} A grant of the royalties, rents and income arising from the production of the oil from a tract of land is a grant of the oil in the land.^{4b}

§ 19. Part of realty.

Oil and gas, until severed from the realty, are as much a part of it as coal or stone. So long as they remain in the ground, outside of an artificial receptacle at least, as the casing of a well or a pipe line, they must be treated as a part of the realty underneath the surface of which they lie.⁵ So much so are they a part of the realty, as we shall repeatedly see hereafter, that a conveyance of them in their natural state in the earth requires all the formalities of a conveyance of any other interest in the same real estate.⁶ A reservation of "all mines, minerals and

⁴ Ontario Natural Gas Co. v. Gasfield, 18 Ont. App. Rep. 626; 38 Am. and Eng. Corp. Cas. 253; see Gesner v. Cairns, 2 Allen (N. B.) 595; and Gesner v. Gas Co., James Rep. (N. B.) 72; *In re Buffalo Natural Gas Co.*, 73 Fed. Rep. 191; Maxwell v. Brierly, 10 Copp. L. D. 50; Roberts v. Jepson, 4 L. D. 60.

^{4a} Columbia Gas & El. Co. v. Moore (W. Va.), 93 S. E. 105; Sult v. Hockstetter Oil Co., 63 W. Va. 317; 61 S. E. 307; Goffrey v. Stowers, 73 W. Va. 420; 80 S. E. 500.

An allegation that a deed conveyed all the coal and other minerals in a certain tract is an allegation in legal effect of the deed, and asserts conveyance of an absolute title to the oil and gas. *Columbia Gas & El. Co. v. Moore, supra*.

^{4b} Paxton v. Benedum-Trees Oil Co. (W. Va.), 92 S. E. 472.

⁵ Hail v. Reed, 15 B. Mon. 479; 11 Morr. Min. Rep. 103; *Columbian Oil Co. v. Blake*, 13 Ind. App. 680; 42 N. E. Rep. 234; *People's Gas Co. v. Tyner*, 131 Ind. 277; 31 N. E. Rep. 59; 16 L. R. A. 443; *Brown v. Spillman*, 155 U. S. 665; 15 Sup. Ct. Rep. 245; *Acheson v. Stevenson*, 146 Pa. St. 299; 23 Atl. Rep. 331; 396; *Williamson v. Jones*, 39 W. Va. 231; 19 S. E. Rep. 436; 25 L. R. A. 222; *Stoughton's Appeal*, 88 Pa. St. 198;

Funk v. Haldeman, 53 Pa. St. 229; *Preston v. White*, 57 W. Va. 278; 50 S. E. Rep. 236; *Kansas Natural Gas Co. v. Haskell*, 172 Fed. Rep. 545; *Waterford Oil & Gas Co. v. Shipman*, 233 Ill. 9; 84 N. E. 53.

The unauthorized severance and removal of oil by a tenant constitutes waste. *Isom v. Rex Crude Oil Co.*, 147 Cal. 659; 82 Pac. Rep. 317.

⁶ *Heller v. Dailey*, 28 Ind. App. 555; 63 N. E. Rep. 490; *American Window Glass Co. v. Williams*, 30 Ind. App. 685; 66 N. E. Rep. 912; *Williamson v. Jones*, 39 W. Va. 231; 19 S. E. 436; *Williamson v. Jones*, 43 W. Va. 562; 27 S. E. 411; *South Tenn. Oil Co. v. McIntire*, 44 W. Va. 296; 38 S. E. 922; *Wilson v. Youst*, 43 W. Va. 826; 28 S. E. 781; *Kelly v. Ohio Oil Co.*, 57 Ohio St. 317; 49 N. E. 399; 63 Am. St. 721; 39 L. R. A. 765; *Osborn v. Arkansas, etc., Gas Co.*, 103 Ark. 175; 146 S. W. 122; *Rumsey v. Sullivan*, 166 N. Y. App. Div. 245; 150 N. Y. Supp. 287 (affirming judgment on rehearing 164 N. Y. App. Div. 911; 148 N. Y. Supp. 1142); *Strother v. Mangham*, 138 Ia. Am. 437; 70 So. 425; *Frank Oil Co. v. Belleview Gas Co.*, 29 Okla. 719; 119 Pac. 260; 45 L. R. A. (N. S.) 487.

metals in and under" a tract of land is a reservation of the oil and gas.⁷

§ 20. Ownership in earth.

The owner of the surface is the owner of the gas and oil beneath it; but if they escape into the land of another he ceases to be the owner of them. They are the subject of grant or conveyance, just as much so as the grant or conveyance of coal or stone buried in the soil of the same tract of land.⁸

⁷ *Murray v. Allard*, 100 Tenn. 100; 43 S. W. Rep. 353; 38 L. R. A. 249; 66 Am. St. Rep. 740; *Osborn v. Arkansas, etc., Gas Co.*, 103 Ark. 175; 146 S. W. 122.

⁸ *Hail v. Reed*, 15 B. Mon. 479; 11 Morr. Min. Rep. 103; *People's Gas Co. v. Tyner*, 131 Ind. 277; 31 N. E. Rep. 59; 16 L. R. A. 443; *Manufacturer, etc., Co. v. Indiana, etc., Co.*, 155 Ind. 461; 57 N. E. Rep. 912; 57 L. R. A. 768; *State v. Ohio Oil Co.*, 150 Ind. 21; 49 N. E. Rep. 809; 47 L. R. A. 627; *Ohio Oil Co. v. Indiana*, 177 U. S. 190; 20 Supp. Ct. Rep. 585; *Townsend v. State*, 147 Ind. 624; 47 N. E. Rep. 19; 37 L. R. A. 294; *Hughes v. United Pipe Lines*, 119 N. Y. 423; 23 N. E. Rep. 1042; *Keir v. Peterson*, 41 Pa. St. 357; *Westmoreland, etc., Co. v. DeWitt*, 130 Pa. St. 235; 18 Atl. Rep. 724; 5 L. R. A. 731; 29 Amer. L. Reg. 93; *Acheson v. Stevenson*, 146 Pa. St. 299; 23 Atl. Rep. 331, 336; *Hague v. Wheeler*, 157 Pa. St. 324; 27 Atl. Rep. 714; 22 L. R. A. 141; *Wood County, etc., Co. v. West Virginia, etc., Co.*, 28 W. Va. 210; *Williamson v. Jones*, 39 W. Va. 231; 19

S. E. Rep. 436; 25 L. R. A. 222; *Kansas Natural Gas Co. v. Haskell*, 172 Fed. Rep. 545; *Kelachny v. Galbreath*, 26 Okl. 772; 110 Pac. Rep. 902; *Bender v. Brooks (Tex.)*, 127 S. W. Rep. 168; *Watford Oil & Gas Co. v. Shipman*, 233 Ill. 9; 84 N. E. Rep. 53; *Louisville Gas Co. v. Kentucky Heating Co.*, 117 Ky. 71; 111 S. W. Rep. 374; *Lanyon Zinc Co. v. Freeman*, 68 Kan. 6911; 75 Pac. Rep. 995; *McGraw Oil Co. v. Kennedy*, 65 W. Va. 595; 64 S. W. Rep. 1027; *West v. Kansas Nat. Gas Co.*, 221 U. S. 229; 31 Sup. Ct. 564; 55 L. Ed. 716; affirming 172 Fed. 545; *Haskell v. Cowham*, 187 Fed. 403; *Rupel v. Ohio Oil Co.*, 176 Ind. 4; 95 N. E. 225.

It has been held that oil and gas are not the subject of ownership, while in the earth, distinct from the soil. *Watford Oil & Gas Co.*, 233 Ill. 9; 84 N. E. Rep. 53, but in right of the owner of the surface to reduce to possession the oil and gas beneath the surface may be sold. *Strother v. Mangham*, 138 La. 437; 70 So. 426.

§ 21. Compared with animals *ferae naturae*.

In seeking for analogous conditions in the law, courts have compared natural gas and oil to that of animals *ferae naturae*. The Supreme Court of Pennsylvania made this comparison in a case that has become a leading authority wherever the subject of gas and oil is discussed. "Water and oil," said the court, "and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *ferae naturae*. In common with animals, and unlike other minerals, they have the power and tendency to escape without the volition of the owner. Their 'fugitive and wandering existence within the limits of a particular tract is uncertain.'⁹ They belong to the owner of the land and are part of it, and are subject to his control; but when they escape, and go into other land, or come under another's control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas. If an adjoining, or even a distant, owner drills his own land, and taps your gas, so that it comes into his well and under his control, it is no longer yours, but his."¹⁰

§ 22. When title vests in owner.

It has been said repeatedly by the courts and writers that the owner of the soil owns the gas and oil beneath its surface; and expressions to this effect will be found in this work. This is an acknowledgment of the absolute ownership of the gas and oil beneath the surface by the owner of the land.¹¹ But under the

⁹ Quoting from *Brown v. Vandergrift*, 80 Pa. St. 147.

¹⁰ *Westmoreland, etc., Co. v. DeWitt*, 130 Pa. St. 235; 18 Atl. Rep. 724; 5 L. R. A. 731; 29 Amer. L. Reg. 93; *People's Gas Co. v. Tyner*, 131 Ind. 277; 31 N. E. Rep. 59; 16 L. R. A. 443; *Townsend v. State*, 147 Ind. 624; 47 N. E. Rep. 19; 37

L. R. A. 294; *Lowther Oil Co. v. Miller*, 53 W. Va. 501; 44 S. E. Rep. 433.

¹¹ See *Jones v. Forest Oil Co.*, 194 Pa. St. 379; 44 Atl. Rep. 1074; 30 Pittsb. L. J. (N. S.) 58; 48 L. R. A. 748; *Watford Oil & Gas Co. v. Shipman*, 233 Ill. 9; 84 N. E. Rep. 53; *Kentucky Heating Co.*, 117 Ky.

Indiana decisions, which have met with the approval of the Supreme Court of the United States,¹² the owner of the land has only a qualified right to the oil and gas beneath the surface—the right to reduce it to possession and to exclude all others attempting to exercise the right on the premises—and title in him to it does not vest until he has reduced it to actual possession, either by bringing it into a well or into a pipe line, or into a tank or other receptacle in case of oil. Until that has happened the gas or oil by natural forces may escape from his land, be reduced to possession by another, and become his property.¹³

§ 23. Ownership of oil differs from that of water.

The ownership of oil, however, is not identical with the ownership of water. It is true both are regarded as minerals, and are also regarded as liquids; in this respect they are legally and physically identical.

71; 111 S. W. Rep. 74; Lanyon Zine Co. v. Freeman, 68 Kan. 691; 75 Pac. Rep. 995; Kansas Natural Gas Co. v. Haskell, 172 Fed. Rep. 545; McGraw Oil & Gas Co. v. Kennedy, 65 W. Va. 595; 64 S. E. Rep. 1027; Rumsey v. Sullivan, 166 N. Y. App. Div. 245; 150 N. Y. Supp. 287 (affirming on rehearing 164 N. Y. App. Div. 911; 148 N. Y. Supp. 1142); Osborn v. Arkansas, etc., Gas Co., 103 Ark. 175; 145 S. W. 122; Fairbanks v. Warrum, 56 Ind. App. 337; 104 N. E. 983; 1141; Strother v. Mangham, 138 La. 437; 70 So. 426.

The owner of the soil has the right to put it into the market. Coalinga Pacific Oil & Gas Co. v. Associated Oil Co., 16 Cal. App. 361; 116 Pac. 1107; Haskell v. Cowhan, 187 Fed. 403.

The grantee of a part of a tract covered by a lease was held to

have no interest in the gas produced through a well on the remainder of the tract, though it flowed from beneath the surface of his part and to have no interest in the stipulated rental on account of the well. Fairbanks v. Warrum, 56 Ind. App. 327; 104 N. E. 983, 1141.

¹² Ohio Oil Co. v. Indiana, 177 U. S. 190; 20 Sup. Ct. Rep. 585.

¹³ State v. Ohio Oil Co., 150 Ind. 21; 49 N. E. Rep. 809; 47 L. R. A. 627; Manufacturer, etc., Co. v. Indiana, etc., Co., 155 Ind. 461; 57 N. E. Rep. 912; 50 L. R. A. 768; Townsend v. State, 147 Ind. 624; 47 N. E. Rep. 21; 37 L. R. A. 294; Crystal Ice, etc., Co. v. Marion Gas Co., 35 Ind. App. 295; 74 N. E. Rep. 15; New American Oil & Mining Co. v. Troyer, 166 Ind. 402; 77 N. E. Rep. 739; 76 N. E. Rep. 253; Fairbanks v. Warrum, 56 Ind. App. 337; 104 N. E. 1141.

"The second ground of defense," said the Court of Appeals of Kentucky, "relies upon the fact that the oil was taken from a well bored down to a running stream of oil, which was vague and fugitive, and had not been confined, nor ever reduced to possession, nor ever in possession of plaintiffs. And in support of this ground we are presented with a very ingenious argument, founded on the principles laid down by elementary authors with respect to water, which Blackstone says must unavoidably remain in common, susceptible only of a usufructuary property, belonging to the first occupant during the time he holds possession of them, and no longer. Whence it is argued that this oil, being a liquid like water, and flowing, as alleged in a stream at the bottom of this well, was common to all, susceptible only of a usufructuary property, and that the particular portion of it now in contest belonged to the defendants, as the first occupants and appropriators of it. But it is to be observed that the portion of Blackstone to which reference is made, is a treatise upon property in general; that is, upon the principles on which the right of property in external things depends, and which he states especially with respect to water, the broad principles applicable to the subject in its most general aspect, without reference to any distinctions or discriminations by which they might be modified. Then, besides the fact that water is not oil, and that while nature furnishes the former almost everywhere, for the common use of man, as being a universal necessity; she furnishes the latter, for the most part, only as the result of arduous labor and intricate processes, and but rarely produces it in its perfect state; it is to be remarked that water itself, though found generally running upon the surface of the earth, where it may be obtained for use by merely taking it, and where, being furnished by nature for the use of all who may conveniently use it, it is only to be appropriated by use and for use, yet it is also frequently found under the surface, and obtained or reached at great expense and labor, by means

of wells by which it is intended to be appropriated. This discrimination is not made, nor was it necessary for the purposes of the author that it should be made in the general view which he was taking of property in general. The very title of the chapter, and the nature of his observations, would lead to the conclusion that he was speaking of water as it is furnished by nature for the ordinary use of man, and as it is commonly found running upon the surface of the earth. The very fact that, after illustrating the principle of property being founded on occupancy and on labor, by reference to the well made by one of the ancient patriarchs, he takes no notice of wells when he comes to treat of water as a subject of property, shows that he thought only of water on the surface, or that he considered a well by which it might be obtained from beneath the surface as a means of appropriation. The other authorities referred to treat especially of water on the surface; the first, considering the subject under the title of running waters, and showing that he is considering water running over land, and the other treating the subject under the title of watercourses, and both stating chiefly the rights of riparian owners. The latter, however, treats specially, though briefly, of springs, as to which he says the owner of land is entitled to all advantages arising from it, and may use a spring found upon it, as he does any other property, without regard to the convenience or advantage of others. And that this right is very different from the right of the owner of an estate through which water flows. What becomes, then, of the common right of all to the use of the water in the spring, if it may be thus exclusively claimed and used and owned by the owner of the soil? And if the water in a spring found on his land is thus his exclusive property, there seems to be much more reason to say that water at the bottom of a well which he has by his labor and expense constructed for the very purpose of retaining water in it for his use, and of facilitating the access to it, is his exclusive property. And still stronger is the reason

for considering him as the exclusive owner of oil, a peculiar liquid not necessary nor indeed suitable for the common use of man, and for reaching and obtaining which for its proper uses and for profit, he has constructed a well with suitable fixtures. It is indeed said in the answer, though it is scarcely to be seen in the evidence, that this well is bored down to a stream of oil. But while there are but slight traces even of a seeping of oil through the well, it is neither alleged nor proved that the well presents no obstruction to the stream or flow of oil, or that it does not hold or retain at least a portion of it, for facility in drawing it out. We know that in wells for drawing water it is usual, and, where the supply is small, necessary to sink the well below the point where the water enters it, so that it may be retained there in sufficient quantities for use, and for drawing it up. There is nothing to show that this was not the case in the present instance, and the jury might have so found. But we are of opinion that whether the water or oil is running through the well in a stream or not, that which is actually in the well is, while it is there, and subject to be drawn out, though it be there only in passing from one side of it to the other, appropriated by the owner to his own use, and belongs to him when it is drawn out, unless this is done by his license and for another's use. If, as may be presumed, the well is sunk below the point at which the water or oil enters, or if the water or oil, in any quantity, stands in it until drawn out, the evidence of appropriation is still stronger, and the right of the owner more easily established. And in either case, the water or oil, if drawn up by a wrongdoer, is the property of the person entitled to the well, or its exclusive use, and may be specifically recovered. Whether the barrels in which the wrongdoer has placed it may also be recovered with the oil, or other barrels should be furnished by the owner, we need not at present decide."¹⁴

¹⁴ *Hail v. Reed*, 15 B. Mon. 479;
11 Morr. Min. Rep. 103.

In *Kansas Natural Gas Co. v. Haskell*, 172 Fed. Rep. 545, it is

§ 24. Owner of land has only a qualified ownership.

The Supreme Court of Indiana, while having repeatedly referred to the fact that the ownership of oil and gas is compared

said that the doctrine of this case is followed in all of the states except in Indiana, and citing the following cases: *Funk v. Haldeman*, 53 Pa. 248; *Stoughton's Appeal*, 88 Pa. 198; *Blakeley v. Marshall*, 174 Pa. 429; 34 Atl. 564; *Gill v. Weston*, 110 Pa. 317; 1 Atl. 921; *Gas Co. v. DeWitt*, 130 Pa. 249; 18 Atl. 724; 5 L. R. A. 731; *Chartiers Block Coal Co. v. Mellom*, 152 Pa. 297; 25 Atl. 597; 18 L. R. A. 702; 34 Am. St. Rep. 645; *Hague v. Wheeler*, 157 Pa. 341; 27 Atl. 714; 22 L. R. A. 141; 37 Am. St. Rep. 736; *Murray v. Alfred*, 100 Tenn. 100; 43 S. W. 355; 39 L. R. A. 249; 66 Am. St. Rep. 740; *Moore v. Griffin*, 72 Kan. 164; 83 Pac. 395; 4 L. R. A. (N. S.) 477; *Isom v. Rex Crude Oil Co.*, 147 Cal. 659; 82 Pac. 317; *Ontario Natural Gas Co. v. Gossfield*, 18 Ont. App. 666; *Hughes v. Pipe Lines*, 119 N. Y. 423; 23 N. E. 1042; *Williamson v. Jones*, 39 W. Va. 256; 19 S. E. 436; 25 L. R. A. 222; *South Penn Oil Co. v. McIntire*, 44 W. Va. 305; 28 S. E. 922; *Carter v. Tyler County Court*, 45 W. Va. 806; 32 S. E. 216; 43 L. R. A. 725; *Williamson v. Jones*, 43 W. Va. 562; 27 S. E. 411; 38 L. R. A. 694; 64 Am. St. Rep. 891; *Wilson v. Youst*, 43 W. Va. 834; 28 S. E. 781; 39 L. R. A. 292; *Preston v. White*, 57 W. Va. 278; 50 S. E. 236; *Kelley v. Ohio Oil Co.*, 57 Ohio St. 328; 49 N. E. 399; 39 L. R. A. 765; 63 Am. St. Rep. 721; *Gas Co. v. Ullery*, 68 Ohio St.

271; 67 N. E. 494; *Honemaker v. Amos*, 73 Ohio St. 170; 76 N. E. 949; 4 L. R. A. (N. S.) 980; 112 Am. St. Rep. 708; *Brown v. Spilman*, 155 U. S. 665; 15 Sup. Ct. 245; 39 L. Ed. 304.

In *Kansas Natural Gas Co. v. Haskell*, 172 Fed. Rep. 545, it was said: "From all of which it becomes apparent the contention of defendants that the natural gas found within the territorial limits of the State is the common heritage of the people of the State, which may be conserved and preserved by the State as trustee of those things in which the people have a common interest, as flowing streams, wild animal life, etc., is unsound and must be denied. On the contrary, it must be held he who by lawful right reduces to his possession mineral, gas, or oil has the same absolute right of property therein, with the same power of barter, sale, or other disposition, including, of necessity, the right of transportation and delivery under such reasonable rules and safeguards as the exigencies of the case may demand and the State employ, as the farmer has of his corn, his wheat, or his stock, or the merchant of his wares, and such absolute right therein as the State cannot deny him without making just compensation, and any attempt to so do would be in violation of the fourteenth amendment to the federal Constitution."

with the ownership of animals *ferae naturae*, has pointed out that the owner of land does not own the wild animals that may be upon it until he has reduced them to actual possession, although he has the right to prohibit any one else taking them so long as they remain on his land. That court quotes from a Minnesota case ¹⁵ with respect to the ownership of wild animals, in which it is said: "We take it to be the correct doctrine in this country that the ownership of wild animals, so far as they are capable of ownership, is in the State, not as proprietors, but in its sovereign capacity as the representative, and for the benefit, of all its people in common. The preservation of such animals as are adapted to consumption as food, or to any other useful purpose, is a matter of public interest; and it is within the police power of the State, as the representative of the people in their united sovereignty, to enact such laws as will preserve such game, and secure its beneficial use in the future to the citizens, and to that end it may adopt any reasonable regulations, not only as to time and manner in which such game may be taken and killed, but also by imposing limitations upon the right of property in such game after it has been reduced to possession." After having made this quotation, and also referring to the fact that it had likened the ownership of natural gas and oil to the ownership of wild beasts, the Indiana court said:

"There is no such thing in such laws, either as to wild animals or fish, to the effect that they become the property of the owner of the land on which the animals are found, or in the waters of which the fish are found. And there is no such thing in such laws to the effect that after title has once vested by actual reduction to possession, that the same may wander off and vest in some one else. To say that the title to natural gas vests in the owner of the land in or under which it exists today, and that tomorrow, having passed into or under the land of an adjoining owner, it thereby becomes his property, is no less absurd and contrary to all the analogy of the law, than to say that wild animals or fowls in 'their fugitive and wandering existence,' in passing over the land, become the property of the owner

¹⁵ State v. Rodman, 58 Minn. 393; 59 N. W. Rep. 1098.

of such land, or that fish in their passage up or down a stream of water become the property of each successive owner over whose land the stream passes. It is as unreasonable and untenable as to say that the air and the sunshine which float over the owner's land are a part of the land, and are the property of the owner of the land. We therefore hold that the title to natural gas does not vest in any private owner until it is reduced to actual possession, and therefore that the Act from which we have quoted is not violative of the Constitution, as an unwarranted interference with private property." ¹⁶

§25. Qualified ownership in oil.—Power of legislature.

The case from which the quotation has been made in the next preceding section was carried to the Supreme Court of the United States; and in affirming it that court used the following language:

"If the analogy between animals *ferae naturae* and mineral deposits of oil and gas, stated by the Pennsylvania court and adopted by the Indiana court, instead of simply establishing a similarity of relation, proved the identity of the two things, there would be an end of the case. This follows because things which are *ferae naturae* belong to the 'negative community'; in other words, are public things subject to the absolute control of the State, which, although it allows them to be reduced to possession, may at its will not only regulate but wholly forbid their future taking. But whilst there is an analogy between animals *ferae naturae* and the moving deposits of oil and natural gas, there is not identity between them. Thus, the owner of land has the exclusive right on his property to reduce the game there found to possession, just as the owner of the soil has the exclusive right to reduce to possession the deposits of natural gas and oil found beneath the surface of his land. The owner of the soil cannot follow game when it passes from

¹⁶ State v. Ohio Oil Co., 150 Ind. 21; 49 N. E. Rep. 809; 47 L. R. A. 627; affirmed Ohio Oil Co. v. Indiana, 177 U. S. 190; 20 Sup. Ct.

Rep. 585; People's Gas Co. v. Tyner, 131 Ind. 277; 31 N. E. Rep. 60; 16 L. R. A. 443; Fairbanks v. Warrum, 56 Ind. App. 337; 104 N. E. 1141.

his property; so, also, the owner may not follow the natural gas when it shifts from beneath his own to the property of some one else within the gas field. It being true as to both animals *ferae naturae* and gas and oil, therefore, that whilst the right to appropriate and become the owner exists, proprietorship does not take place until the particular subjects of the right become property by being reduced to actual possession. The identity, however, is for many reasons wanting. In things, *ferae naturae* all are endowed with the power of seeking to reduce a portion of the public property to the domain of private ownership by reducing them to possession. In the case of natural gas and oil no such right exists in the public. It is vested only in the owners in fee of the surface of the earth within the area of the gas field. This difference points at once to the distinction between the power which the lawmaker may exercise as to the two. In the one, as the public are the owners, every one may be absolutely prevented from seeking to reduce to possession. No divesting of private property, under such a condition, can be conceived because the public are the owners, and the enacting by the State of a law as to the public ownership is but the discharge of the governmental trust resting in the States as to property of that character. On the other hand, as to gas and oil, the surface proprietors within the gas field all have the right to reduce to possession the gas and oil beneath. They could not be absolutely deprived of this right which belongs to them without a taking of private property. But there is a co-equal right in them all to take from a common source of supply, the two substances which in the nature of things are united, though separate. It follows from the essence of their right and from the situation of the things, as to which it can be exerted, that the use by one of his power to seek to convert a part of the common fund to actual possession may result in an undue proportion being attributed to one of the possessors of the right, to the annihilation of the rights of the remainder. Hence it is that the legislative power, from the peculiar nature of the right and objects upon which it is to be exerted, can be manifested for the purpose of protecting all the collective owners by securing a just distribution, to arise

from the enjoyment by them, of their privilege to reduce to possession, and to reach the like end by preventing waste. This necessarily implied legislative authority is borne out by the analogy suggested by things *ferae naturae*, which it is unquestioned the legislature has the authority to forbid all from taking, in order to protect them from undue destruction, so that the right of the common owners, the public, to reduce to possession may be ultimately efficaciously enjoyed. Viewed, then, as a statute to protect or to prevent the waste of the common property of the surface owners, the law of the State of Indiana which is here attacked because it is asserted that it divested private property without due compensation, in substance, is a statute protecting private property and preventing it from being taken by one of the common owners, without regard to the enjoyment of the others. Indeed, the entire argument, upon which the attack on the statute must depend, involves a dilemma, which is this: If the right of the collective owners of the surface to take from the common fund, and thus reduce a portion of it to possession, does not create a property interest in the common fund, then the statute does not provide for the taking of private property without compensation. If, on the other hand, there be, as a consequence of the right of the surface owners to reduce to possession, a right of property in them, in and to the substances contained in the common reservoir of supply, then as a necessary result of the right of property, its indivisible quality and the peculiar position of the things to which it relates, there must arise the legislative power to protect the right of property from destruction. To illustrate by another form of statement, the argument is this: There is property in the surface owners in the gas and oil held in the natural reservoir. Their right to take cannot be regulated without divesting them of their property without adequate compensation, in violation of the Fourteenth Amendment, and this, although it be that if regulation cannot be exerted one property owner may deprive all the others of their rights, since his act in so doing will be *damnum absque injuria*. This is but to say that one common owner may divest all the others of their rights without wrong-doing, but the lawmaking power cannot protect

all the owners in their enjoyment without violating the Constitution of the United States.”¹⁷

§ 26. Depriving owner of soil of right to oil and gas beneath surface.

From what has been said, it is very clear that the owner of land can not be deprived of his right to the oil and gas beneath the surface without just compensation. They are just as much his as the land. “The surface proprietors in the gas field all have the right to reduce to possession the good oil beneath. They could not be absolutely deprived of the right, which belongs to them, without a taking of private property.”^{17a} This, of course, includes the right to transport it to a market if it can be done without invading the rights of adjoining landowners; and to sell it, either within or without the state.^{17b}

§ 27. Severance of oil or gas from realty.

In instances of solid minerals the severance of them by artificial means renders them personal property, the ownership of which is presumptively in the owner of the land, or if the land has been leased for mining purposes, in the lessee.¹⁸ But if a wrong-doer with felonious intent sever the mineral and take it away, his act is not a larceny, but merely a trespass.¹⁹ If the act of severance be at one time, and the carrying away at an-

¹⁷ *Ohio Oil Co. v. Indiana*, 177 U. S. 190; 20 Sup. Ct. Rep. 585; 44 L. Ed. 729; *Given v. State*, 160 Ind. 552; 66 N. E. Rep. 750; *Richmond Natural Gas Co. v. Enterprise Natural Gas Co.*, 31 Ind. App. 222; 66 N. E. Rep. 782; *Lowther Oil Co. v. Miller, etc., Co.*, 53 W. Va. 501; 44 S. E. Rep. 433.

This doctrine of the case of *Ohio Oil Co. v. Indiana*, *supra*, is recognized in *Attorney General v. Hudson County Water Co.*, 70 N. J. Eq. 695; 65 Atl. Rep. 489.

For waste of artesian water, see *Huber v. Merkel*, 117 Wis. 355; 94 N. W. Rep. 354.

^{17a} *Ohio Oil Co. v. Indiana*, 177 U. S. 190; 20 Sup. Ct. Rep. 576; 44 L. Ed. 729; *Kansas Natural Gas Co. v. Haskell*, 172 Fed. Rep. 545.

^{17b} *Kansas Natural Gas Co. v. Haskell*, *supra*. The owner of oil or gas cannot be deprived of the right to put it into State commerce. *West v. Kansas Natural Gas Co.*, 221 U. S. 229; 31 Sup. Ct. 564; 55 L. Ed. 716.

¹⁸ *Leport v. Mining Co.*, 3 N. J. L. J. 280; *Brown v. Morris*, 83 N. C. 251; *Watts v. Tibbals*, 6 Pa. St. 447; *Rhoades v. Patrick*, 27 Pa. St. 323; *Lyon v. Gorley*, 53 Pa. St. 261; *Green v. Ashland Iron Co.*, 62 Pa. St. 97; *Lykens Valley Coal Co. v. Dock*, 62 Pa. St. 232; *Noble v. Sylvester*, 42 Vt. 146; *Forbes v. Gracev*, 94 U. S. 762.

¹⁹ *People v. Williams*, 35 Cal. 671; *Commonwealth v. Steinling*, 156 Pa. St. 400; 27 Atl. Rep. 297; *State v. Burt*, 64 N. C. 619.

other, the taking will, however, be larceny.²⁰ The act of severance and the act of carrying away must be a continuing one, without separation; for if it is not, the severed mineral becomes the personal property of the owner of the realty.²¹ It matters not that the mineral is severed by a stranger; for in such an instance it becomes as much personal property as if the owner had severed it;²² and still remains the property of the land owner.²³ All that has been said of solid minerals is true of oil and gas. As soon as they are severed from the earth they become personal property.²⁴ Whenever oil or gas is brought to the surface and confined in tanks or pipe lines it becomes personal property of the owner of the well.²⁵ If a lessee own the well, it is his property, unless the land owner is entitled to a specific part, in which event, they own it jointly until a division is made.²⁶ If oil or gas be taken from the real estate it still belongs to the owner of the land or the lessee, as the case may be.²⁷

§ 28. Recovery of severed product.—Trover.

The owner of the land, or the lessee of it, from which oil has been taken may recover possession of it wherever he can find it; and for that purpose an action of replevin will lie;²⁸ or he may bring an action in trover.²⁹ A purchaser of oil wrongfully

²⁰ *Commonwealth v. Steinling, supra.*

²¹ *Commonwealth v. Steinling, supra.*

²² *Attersoll v. Stevens*, 1 Taunt 183.

²³ *Hughes v. United Pipe Lines*, 119 N. Y. 423; 23 N. E. Rep. 1042; *Lanyon Zinc Co. v. Freeman*, 68 Kan. 691; 71 Pac. 995.

²⁴ *Stoughton's Appeal*, 88 Pa. St. 198; *Shepherd v. McClamont Oil Co.*, 38 Hun, 37; *Hail v. Reed*, 15 B. Mon. 479; 11 Morr. Min. Rep. 103; *Hughes v. United Pipe Lines, supra*; *Wagner v. Mallory*, 169 N. Y. 501; 62 N. E. Rep. 584; affirming 58 N. Y. Supp. 526; *Crystal Ice, etc., Co. v. Marion Gas Co.*, 35 Ind. App. 295; 74 N. E. Rep. 15; *Commonwealth v. Dingmer*, 26 Pa. Super. Ct. 615; *Kansas Natural Gas Co. v. Haskell*, 172 Fed. Rep. 545; *Poe v. Ullrey*, 233 Ill. 56; 84 N. E. Rep. 46; *Fairbanks v. Warrum*, 56 Ind. App. 337; 104 N. E. 1141.

²⁵ *Kelly v. Ohio Oil Co.*, 57 Ohio St. 317; 49 N. E. Rep. 399; 39 L. R. A. 765; 63 Am. St. Rep. 721; *State v. Indiana, etc., Co.*, 120 Ind. 575; 22 N. E. Rep. 778; 6 L. R. A. 579; 29 Am. and Eng. Corp. Cas. 237.

²⁶ *Carter v. County Court*, 45 W. Va. 806; 32 S. E. Rep. 216; 43 L. R. A. 725.

²⁷ *Williamson v. Jones*, 43 W. Va. 562; 27 S. E. Rep. 411; 38 L. R. A. 694; 64 Am. St. Rep. 891; *Hughes v. United Pipe Lines*, 119 N. Y. 423; 23 N. E. Rep. 1042; *Fairbanks v. Warrum*, 56 Ind. App. 337; 104 N. E. 1141; § 873, note 83.

²⁸ *Williamson v. Jones*, 43 W. Va. 562; 27 S. E. Rep. 411; 38 L. R. A. 694; 64 Am. St. Rep. 891; *Omaha, etc., Co. v. Tabor*, 13 Colo. 41; 21 Pac. Rep. 925.

²⁹ *Hail v. Reed*, 15 B. Mon. 479; 11 Morr. Min. Rep. 103; *Oak Ridge Coal Co. v. Rogers*, 108 Pa. St. 147. *Contra*, *Kier v. Peterson*, 41 Pa. St. 357.

taken from the soil gains no title to it; and the owner of the land may pursue and recover it or its value wherever he may find it.³⁰ Even a purchaser from a person who took the oil from land under a license from a co-tenant is liable for its conversion, the same as the person who took it.³¹ In the case of a life estate, the remainderman who is in being and would take the estate if the life estate were extinguished, will be entitled to the possession of all the oil taken by the life tenant or by a stranger from wells sunk after the life estate was created.³² But neither replevin nor trover will lie against a pipe line company for the value of oil taken from land by one in adverse possession of such land, and delivered to the company for transportation.³³

§ 29. Ejectment for possession of oil or gas.

Owing to the peculiar property of oil or natural gas, an action in ejectment can not be maintained to recover possession of it alone. Thus; as no title to the gas or oil beneath the surface passes to the lessee until he has brought it to the surface or secured it in the tubing of the well, he can not maintain an action in ejectment to recover its possession.^{33a}

§ 30. Wasting gas.—Injunction.

So strongly is the notion of absolute ownership of the gas and oil in the land by the owner of it, beneath which it is found, embedded in our law, that without the aid of a statute the owner of such land cannot be prevented from wasting it by the owner of the adjoining premises. In the case of gas where two wells are placed within a few feet of each other it is clear that they draw gas from the same reservoir; and this is true, of course, when a boundary line between two tracts of land run between them. If, therefore, the owner of one of the wells persist in leaving his well open, not using the gas, it is quite manifest that the gas under the surface of the tract, or under a portion of it, on which the well is not situated, will be drawn

³⁰ *Hughes v. United Pipe Lines*, 119 N. Y. 423; 23 N. E. Rep. 1042.

³¹ *Omaha, etc., Co. v. Tabor*, *supra*.

³² *Williamson v. Jones*, *supra*.

³³ *Giffin v. Southwest, etc., Lines*, 172 Pa. St. 580; 33 Atl. Rep. 578. See *Anderson v. Hapler*, 34 Ill. 436, and *contra*, *Louisville Gas Co. v. Kentucky Heating Co.*, 117 Ky. 71; 77 S. W. 368; 25 Ky. L. Rep. 1221; 70 L. R. A. 551; 111 Am. St. 225.

^{33a} *Watford Oil & Gas Co. v. Shipman*, 233 Ill. 9; 84 N. E. Rep. 53; *Gillespie v. Fulton Oil Co.*, 236 Ill. 188, 206; 86 N. E. 219. This is the rule in Illinois; and the Federal Courts follow that rule where are involved Illinois leases. *Gulley v. Smith*, 237 U. S. 101; 35 Sup. Ct. 525; 59 L. Ed. 856; reversing 202 Fed. 106; see, however, 120 and 824.

off and wasted. And yet, with the notions of absolute ownership prevailing with respect to gas beneath the surface of land, a court of equity will not enjoin the waste, unless some positive statute forbid it.³¹ But where a statute forbade such a waste of gas, it was held that the State, in its sovereign capacity, could enjoin the waste; and the statute was upheld on the theory that the land owner had no title to the gas or oil beneath the surface of the tract of land he owns, except the right to drill on his own land to take it into his possession; and as long as he had no title to it, the legislature had the right to prescribe the mode of taking it.³² The State also has the power to prevent the waste of gas by the use of Flambeau Burners.³³

§ 31. Increasing flow of gas by pumping well.

While every land owner has the right to bore for gas on his own land, and to use such portion of it as rises by natural laws to the surface in his wells or flows into his pipes, yet an adjoining owner, at least, has no right to induce an unnatural flow into or through his well, or do any act with reference to the common reservoir and the gas in it, injurious to or calculated to destroy it; and an action may be maintained by the owners of the superincumbent lands to enjoin another owner from using devices for pumping, or any other artificial process, that

³¹ *Hague v. Wheeler*, 157 Pa. St. 324; 33 W. N. C. 83; 27 Atl. Rep. 714; 22 L. R. A. 141; *Jones v. Forest City Oil Co.*, 194 Pa. St. 379; 44 Atl. 1074; 48 L. R. A. 748; *Kelly v. Ohio Oil Co.*, 57 Ohio St. 317; 49 N. E. Rep. 399; 39 L. R. A. 765; 63 Am. St. Rep. 721, affirming 9 Ohio C. C. Rep. 511; 38 Wkly. L. B. 299; 39 Wkly. L. Bull. 54. See 6 Ohio Cir. Dec. 470; 40 Wkly. L. Bull. 338; 3 Ohio Dec. 186.

In recent cases, however, injunctions have been granted in such instances. *Gillespie v. Fulton Oil & Gas Co.*, 236 Ill. 188; 86 N. E. Rep. 219; *Louisville Gas Co. v. Kentucky Heating Co.*, 117 Ky. 71; 77 S. W. Rep. 368; 25 Ky. L. Rep. 1221; 70 L. R. A. 558; 111 Am. St. 225.

³² *Manufacturers', etc., Co. v. Indiana, etc., Co.*, 155 Ind. 461; 57 N.

E. Rep. 912; 50 L. R. A. 763; *Ohio Oil Co. v. Indiana*, 177 U. S. 190; 20 Sup. Ct. Rep. 585; *Given v. State*, 160 Ind. 552; 66 N. E. Rep. 750; *Richmond, etc., Co. v. Enterprise, etc., Co.*, 31 Ind. App. 222; 66 N. E. Rep. 782; *La Harpe v. Elm Tp. Gaslight, etc., Co.*, 69 Kan. 97; 76 Pac. Rep. 448; *Kansas Natural Gas Co. v. Haskell*, 172 Fed. Rep. 545; *Hathorn v. Natural Carbonic Gas Co.*, 194 N. Y. 326; 87 N. E. Rep. 504, affirming 128 App. Div. 33; 112 N. Y. Supp. Rep. 374, modifying and affirming 60 Misc. Rep. 341; 113 N. Y. Supp. Rep. 458.

³³ *Townsend v. State*, 147 Ind. 624; 47 N. E. Rep. 19; 37 L. R. A. 294; *Given v. State, supra*; *Richmond, etc., Co. v. Enterprise, etc., Co., supra*.

shall have the effect of increasing the natural flow of the gas.³⁷ In an earlier Indiana case a different rule was adopted.³⁸ In the more recent Indiana case the following language was used in discussing this question:

“Natural gas is a fluid mineral substance, subterranean in its origin and location, possessing, in a restricted degree, the properties of underground waters, and resembling water in some of its habits. Unlike water, it is not generally distributed, and, so far as now understood, it can be used for but few purposes, the most important being that of fuel. Its physical occurrence is in limited quantities only, within circumscribed areas of greater or less extent. If it could be dealt with as subterranean waters, there would be little difficulty in determining the rules by which the right of land owners, and other persons interested in it, should be governed. But the difference between natural gas and underground waters, whether flowing in channels or percolating the earth, is so marked that the principles which the courts apply to questions relating to the latter are not adapted to the adjustment of the difficulties arising from conflicting interests in this new and peculiar fluid. Natural gas being confined within limited territorial areas, and being accessible only by means of wells or openings upon the lands underneath which it exists, is not the subject of public rights in the same sense, or to the same extent, as animals *ferae naturae*, and the like, are said to be. Without the consent of the owner of the land, the public cannot appropriate it, use it, or enjoy any benefit whatever from it. This power of the owner of the land to exclude the public from its use and en-

³⁷ *Manufacturers', etc., Co. v. Indiana, etc., Co.*, 155 Ind. 461; 57 N. E. Rep. 912; 50 L. R. A. 768; *Manufacturers' Gas & Oil Co. v. Indiana Nat. Gas Co.*, 156 Ind. 679; 59 N. E. 169; 60 N. E. 1080; *Manufacturers' Gas & Oil Co. v. Indiana Nat. Gas Co.*, 155 Ind. 556; 58 N. E. 851; *Richmond Nat. Gas Co. v. Enterprise Nat. Gas Co.*, 31 Ind. App. 222; 66 N. E. 782; *Jones v. Forest Oil Co.*, 194 Pa. 379; 44 Atl. 1074.

The increasing by pumps the flow of percolating mineral waters and gas upon lands by a proprietor, so that he increases a greatly increased proportion of a common supply, at

the expense of the neighboring lands, for the sale thereof, especially if he turns the water to waste, may be enjoined by a court of equity, without any aiding statute, at the suit of the owners of such neighboring lands. *Hathorn v. Natural Carbonic Gas Co.*, 194 N. Y. 326; 87 N. E. Rep. 504, affirming 128 App. Div. 33; 112 N. Y. Supp. Rep. 374, modifying 60 Misc. Rep. 341; 113 N. Y. Supp. Rep. 458. See *Lindsley v. Natural Gas Co.*, 162 Fed. Rep. 954.

³⁸ *People's Gas Co. v. Tyner*, 131 Ind. 277; 31 N. E. Rep. 59; 16 L. R. A. 443.

joyment plainly distinguishes it from all other things with which it has been compared, in the use, enjoyment and control, of which the public has the right to participate, and tends to impress upon it, even when in the ground in its natural state, at least in a qualified degree, one of the characteristics or attributes of private property. In the case of animals *ferae naturae*, fish, and the like, this public interest is said to be represented by the sovereign or State. So, in the case of navigable rivers and public highways, the State, in behalf of the public, has the right to protect them from injury, misuse, or destruction. But in the case of natural gas, there are reasons why the right to protect it from entire destruction while in the ground should be exercised by the owners of the land who are interested in the common reservoir. From the necessity of the case, this right ought to reside somewhere, and we are of the opinion that it is held, and may be exercised by the owners of the land, as well as by the State. Natural gas in the ground is so far the subject of property rights in the owners of the superincumbent lands, that while each of them has the right to bore or mine for it on his own land, and to use such portion of it as when left to the natural laws of flowage may rise in the wells of such owner and into his pipes, no one of the owners of such lands has the right, without the consent of all the other owners to induce an unnatural flow into, or through his own wells, or to do any act with reference to the common reference to the common reservoir, and body of gas therein, injurious to, or calculated to destroy it. In the case of lakes, or flowing streams, it cannot be said that any particular part, or quantity, or proportion of the water in them belongs to any particular land or riparian owner, each having an equal right to take what reasonable quantity he will for his own use. But the limitation is upon the manner of taking. So, in the case of natural gas, the manner of taking must be reasonable, and not injurious to, or destructive of, the common source from which the gas is drawn. The right of each owner to take the gas from the common reservoir is recognized by the law, but this right is rendered valueless if one well owner may so exercise his right as to destroy the reservoir, or to change its condition in such manner that the gas will no longer exist there.³⁹

³⁹ *Manufacturers', etc., Co. v. Indiana, etc., Co.*, 155 Ind. 461; 57 N. E. Rep. 912; 50 L. R. A. 768; *Richmond*

Natural Gas Co. v. Enterprise Natural Gas Co., 31 Ind. App. 222; 66 N. E. Rep. 782. In this last case it

§ 32. Pumping oil wells.

It is clear that the doctrine of the Indiana cases has its limitations, and must not be carried too far. For in the case of oil wells, if pumps cannot be used, little oil can be taken out, and the land as an oil territory is practically useless. It is practically immaterial whether a gas well can be pumped if gas cannot be otherwise obtained; for when it becomes necessary to pump a gas well in order to get gas out of it, it is of no value whatever as a gas well. But in the case of oil wells, hundreds if not thousands are pumped every day; and if the right to use a pump to get oil from them did not exist, few would ever be drilled. We think the right to pump them clearly exists.⁴⁰ It should be borne in mind that in the Indiana cases in which the right to use a pump was discussed, the court had before it the right to pump a gas well, and not an oil well.⁴¹

was held that no offense was committed where the pump did not destroy the back pressure of the gas, and so did not create a suction in the well, consequently not increasing the natural flow.

Where a statute prohibited the acceleration or increase of the flow of percolating waters or natural carbonic acid gas from wells bored into the rock, by pumping, or otherwise: 1, absolutely and without qualification; 2, where the result would be to impair the natural flow or the quality of the water or gas in the spring or well of another person; 3, where the object of so doing was to extract and collect the carbonic gas for the market, it was held that the first and second propositions were unconstitutional, because it was a taking of the water and enjoyment of private property, the landowner being prohibited from extracting, by the simplest means and most modest contrivance, water from a bored well on his own land for purposes connected with the use of such land, if the well was in rock and the water contained mineral salts and carbonic acid gas, he having a vested right to draw percolating water from under his land for purposes legitimately connected with the enjoyment of such land, even though it interferes with others. But the third prohibition was held

constitutional; a landowner having no vested right to unnecessarily and unnaturally force the flow of percolating waters for any purpose not connected with the use or enjoyment of his land. *Hathorn v. Natural Carbonic Gas Co.*, 194 N. Y. 326; 87 N. E. Rep. 504, affirming 128 App. Div. 33; 112 N. Y. Supp. Rep. 374, and modifying 60 Misc. Rep. 341; 113 N. Y. Supp. 458. See *Lindsley v. Natural Carbonic Gas Co.*, 162 Fed. Rep. 954.

In Indiana, by statute, the pressure in the pipes could not be increased by pumping, so as to exceed 300 pounds to the square inch. This was held not to prevent the use of pumps for the purpose of overcoming the friction incident to the flow of gas through a long pipe, if the natural flow of the gas was not thereby increased where the pressure did not exceed the limit allowed by this statute. *Consumers' Gas Trust Co. v. American Plate Glass Co.*, 162 Ind. 392; 68 N. E. Rep. 1020.

⁴⁰ *Jones v. Forest Oil Co.*, 194 Pa. St. 379; 44 Atl. Rep. 1074; 48 L. R. A. 748.

⁴¹ See *Manufacturers', etc., Co. v. Indiana, etc., Co.*, 155 Ind. 461; 57 N. E. Rep. 912; 50 L. R. A. 767; *Manufacturers', etc., Co. v. Indiana, etc., Co.*, 156 Ind. 679; 58 N. E. Rep. 706; 53 L. R. A. 134.

§ 33. Exploding nitroglycerin in well to increase flow.

The owner of a well has the right to explode nitroglycerin or other explosive in a well to increase the flow of gas or oil, even though he thereby may, or actually does, draw away the gas or oil in the adjoining territory.⁴²

§ 34. Maliciously boring well to injure another.

No one has the right to use his property for the sole purpose of injuring another. Such a right is not incident to ownership, and the right to use property in that way does not extend that far. So no one has the right to dig a well solely to drain another's water well. Such an act in law is malicious.⁴³ What is true of a well of water is true of a gas or oil well. If the owner of land sink an oil or gas well on his own land for the sole purpose of injuring the oil or gas well of another, and it has that effect, he may be restrained by injunction.⁴⁴

§ 35. Measure of damages for unlawfully taking oil and gas from the soil.*

If oil has been unlawfully taken from the soil, the owner, whoever he may be, has the option either to recover the oil or its value.⁴⁵ Where the act of taking is a trespass, according to one line of cases concerning solid minerals, the wrong-doer is not entitled to be credited with the cost of taking out the mineral, if he knew it belonged to the plaintiff.⁴⁶ Another line

⁴² People's Gas Co. v. Tyner, 131 Ind. 277; 31 N. E. Rep. 59; 16 L. R. A. 443; Tyner v. People's Gas Co., 131 Ind. 599; 31 N. E. 61. See as to damages in shooting a well, Davidson v. Humes, 188 Pa. 335; 41 Atl. 649; Zahniser, etc., Co. v. Pennsylvania Torpedo Co., 190 Pa. 350; 42 Atl. 707.

The lessee is not bound to resort to exploding nitroglycerin in a well he has drilled, in order to obtain oil or gas and comply with his duty to use diligence in the development of the premises, especially so where there is little probability that the explosion would produce paying results. Rice v. Ege, 42 Fed. Rep. 661. See Foster v. Elk Fork Oil and Gas Co., 90 Fed. Rep. 178.

⁴³ Chasemore v. Richards, 7 H. L. Cas. 349; 2 H. and N. 168; 29 L. J.

Exch. 81; 5 Jur. (N. S.) 873; 7 W. R. 685; Rideout v. Knox, 148 Mass. 368; 19 N. E. Rep. 390; Gagnon v. French Lick, etc., Co., 163 Ind. 687; 72 N. E. Rep. 879. See Hathorn v. Natural Carbonic Gas Co., 194 N. Y. 326; 87 N. E. 504, affirming 128 App. Div. 33; 112 N. Y. Supp. 374, modifying and affirming 60 Misc. Rep. 341; 113 N. Y. Supp. 458.

⁴⁴ Dictum in Hague v. Wheeler, 157 Pa. St. 324; 33 W. N. C. 83; 27 Atl. Rep. 714; 22 L. R. A. 141.

⁴⁵ Buckley v. Kenyon, 10 East 139.

⁴⁶ The cases we cite are cases with respect to solid minerals. Martin v. Porter, 5 M. & W. 352; 2 H. and H. 70; Benson, etc., Co. v. Alta, etc., Co., 145 U. S. 428; 12 Sup. Ct. Rep. 877; Bennett v. Thompson, 13 Ired. L. 146; Kock v. Maryland

*See § 348.

of cases holds, in case of solid minerals, that the measure of damages is the value of the mineral as it existed in place before it was broken down.⁴⁷ It must be patent, however, to every one that the last rule cannot be applied to a case of oil or gas, because of the impossibility of determining the value of either gas or oil in situ. In the case of a wilful or negligent trespass the rule should follow the rule first above enumerated, and the trespasser charged with the value of the oil or gas taken, without any deduction for the cost of taking it out; but if the trespasser was innocent of the fact that he was a trespasser, and is not guilty of negligence in entering upon the ground and taking the oil or gas, the cost of extracting it should be allowed him. This is the general rule where the trespasser is innocent of any intent to do wrong, or has not been guilty of negligence.⁴⁸

Coal Co., 68 Md. 125; 11 Atl. Rep. 700; *Jegon v. Vivian*, L. R. 6 Ch. App. 742; 40 L. J. Ch. 389; 19 W. R. 365; *McLean County Coal Co. v. Long*, 81 Ill. 359; *Wild v. Holt*, 9 M. and W. 672; 1 D. N. S. 876; 11 L. J. Exch. 285; *Morgan v. Powell*, 9 M. and W. 672; *Baker v. Hart*, 123 N. Y. 470; 25 N. E. Rep. 948.

Another line of cases hold that the measure of damages is the value of the mineral after severance and before removal. *Llynvi Coal Co. v. Brogden*, L. R. 11; Eq. 183; 40 L. J. Ch. 46; 24 L. T. 612; *Robertson v. Jones*, 71 Ill. 405; *Sunnyside Coal Co. v. Reitz*, 14 Ind. App. 478; 43 N. E. Rep. 46; *Thomas, etc., Co. v. Herter*, 60 Ill. App. 58; *Illinois, etc., Ry. Co. v. Ogle*, 82 Ill. 627; *Barton Coal Co. v. Cox*, 39 Md. 1; *Franklin Coal Co. v. McMillan*, 49 Md. 549.

⁴⁷ *Wood v. Morewood*, 3 Q. B. 440, note; *Hilton v. Woods*, L. R. 4 Eq. 432; 36 L. J. Ch. 491; 16 L. T. 736; 15 W. R. 1105; *In re United Merthyr Coal Co.*, L. R. 15; Eq. 46; 21 W. R. 117; *Livingston v. Rawyards*, 5 App. Cas. 25; 42 L. T. 334; 28 W. R. 357; *Powell v. Aikin*, 4 Kay

and J. 343; *Cheesman v. Shreve*, 40 Fed. Rep. 787; *Colorado, etc., Co. v. Turck*, 70 Fed. Rep. 294; *Golden Reward Mining Co. v. Buxton*, 97 Fed. Rep. 413; *Durant Mining Co. v. Percy, etc., Co.*, 93 Fed. Rep. 166.

⁴⁸ *Dyke v. National Transit Co.*, 22 N. Y. App. Div. 360; 49 N. Y. Supp. 180; *Gladys City Oil, etc., Co. v. Right of Way Oil Co. (Tex. Civ. App.)*, 137 S. W. 171.

If a person, with notice of the right of another under a lease to explore for oil, invade the leased premises, he may be enjoined, and he forfeits whatever work he has done, and material which cannot be taken away without injury to what has been done; but he may remove machinery or materials used in drilling, pumping, conveying or storing oil which is not a part of the wells themselves. *Gillespie v. Fulton Oil & Gas Co.*, 239 Ill. 326; 88 N. E. Rep. 192; *Guffey v. Smith*, 237 U. S. 101; 35 Sup. Ct. 526; 59 L. Ed. 856; reversing 202 Fed. 106; 120 C. C. A. 426; *Loeb v. Conley*, 160 Ky. 91; 169 S. W. 575.

This rule applies to one enter-

§ 36. When lessee acquires title to oil.

A mere lessee—one who has no interest in the land itself, as a grantee beneath the surface—does not acquire title to the oil in the leased premises until it has been taken from the ground.⁴⁹ In passing on this point the New York court said:

ing upon public lands and extracting oil under a belief of right to do so where the belief is justifiable. *United States v. Midway Northern Oil Co.*, 232 Fed. 619, Sec. 309, notes.

The right of the lessee is not limited to his remedy by injunction; he may recover as damages the value of the oil. *Campbell v. Smith*, 180 Ind. 159; 101 N. E. 89.

If an action for damages will give full redress, a suit for an injunction will not lie. *Ibid.*

Where the owner of land, after attempting to terminate the lease made another lease to another person who removed the oil from the premises it was held that he was not a wilful wrongdoer, and was liable to the original lessee only for the value of the oil, less the cost of extracting it from the soil. *Campbell v. Smith*, 180 Ind. 159; 101 N. E. 89.

Where the defendant consulted an abstractor if he would get a first lease on the premises, and was told he would, when in fact there was a prior lease of record, it was held that he was in the position of an innocent purchaser and liable only for the value of the oil less the cost of production. *Guffey v. Smith*, *supra*. In the case just cited the second lessee was held not entitled to deduct the cost of production upon such oil as he extracted from the premises after actual notice of the prior lease.

In an action for taking oil from the land of another, even though the taking was in good faith, interest may be allowed as of the date of conversion. *Bryson v. Crown Oil Co.*, 185 Ind. —; 112 N. E. 1.

Under the Louisiana Civ. Code, arts. 503, 1934, 3452, where a lessee under an oil and gas lease brings in a gas well after expiration of the term stipulated, and it appears that he acted in good faith under the advice of competent counsel before suit was brought, he will not be liable for exemplary damages. *Cooke v. Gulf Refining Co.*, 65 So. 758, 135 La. 609.

The lessee in possession of land under an oil and gas lease is not necessarily a possessor in bad faith from the filing of a suit by the owner for cancellation of the lease, but his good faith may be shown to exist until the right of the person claiming possession is established; Civ. Code, art. 503, defining bona-fide possession, referring to a petitory action. *Cooke v. Gulf Refining Co.*, 65 So. 758, 135 La. 609.

⁴⁹ *Wagner v. Mallory*, 169 N. Y. 501; 62 N. E. Rep. 584; affirming 58 N. Y. Supp. 526; *Lowther Oil Co. v. Miller, etc., Co.*, 52 W. Va. 88; 44 S. E. Rep. 433; *Gillespie v. Fulton Oil & Gas Co.*, 239 Ill. 326; 88 N. E. Rep. 192; *Poe v. Ulrey*, 233 Ill. 56; 84 N. E. Rep. 46; *Watford Oil & Gas Co. v. Shipman*, 233 Ill. 9; 84 N. E. Rep. 53; *Headley v. Hoopengartner*, 60 W. Va. 626; 55

"It will be observed that there is, by the terms of the lease no grant of the oil as it exists in the earth, so that there is no passing of the title to the oil as it exists in its natural state, but that the right is limited to the mining and excavating, or the pumping and raising, of the oil from the premises. It is a right to produce or extract the oil from the earth, yielding one-eighth thereof to the landlord. What was his right? Was it real estate or personal property? It is said that leases of this character are incorporeal hereditaments, and that petroleum oil is a mineral, and is a part of the royalty like coal, iron and copper. It is true, it is a mineral substance; but it widely differs from the minerals mentioned, which are solids, having a fixed location in the earth, like the rock itself. Petroleum oil is a fluid found in the porous sand rock of the earth. In some instances it doubtless exists in pools, but where are the pools located? They may be under the lands in which the well is drilled. They may be in the abutting or remote lands, and may drain into the wells through seams or crevices in the rock, and then be extracted from the earth and reduced to possession by the operator. In this respect oil resembles water as it exists in the earth—especially salt and mineral waters, which have a market value—and is largely governed by the same rule of law. It consequently was held at a very early day in the history of the petroleum oil production that a man could not be restrained by his abutting neighbor from boring for oil upon his own premises, although he located his well within a few feet of the line, and would necessarily drain the oil from his neighbor's land, if any existed therein. We consequently are of the opinion that no title to the oil vested in the lessee

S. E. Rep. 744; *Kansas Natural Gas Co. v. Haskell*, 172 Fed. Rep. 545; *McGrew Oil & Gas Co. v. Kennedy*, 65 W. Va. 595; 64 S. E. Rep. 1027; *Smith v. Root*, 66 W. Va. 633; 66 S. E. Rep. 1005; *O'Neil v. Sun Co.*, 58 Tex. Civ. App. 167; 123 S. W. Rep. 172; *South Penn. Oil Co. v. Haught*, 71 W. Va. 720; 78 S. E. 759; *Burgan v. South Penn. Oil Co.*, 243 Pa. 128; 89 Atl. 823; *Osborne v.*

Arkansas, etc., Gas Co., 103 Ark. 175; 146 S. W. 122; *Gain v. South Penn. Oil Co.*, 76 W. Va. 769; 86 S. E. 883; *La. A. A.* 1916 B, 1002.

The grant of oil and gas in the earth is a grant of such part as the grantee may find, and the grantee cannot maintain ejectment or other real action to recover it. *Watford Oil & Gas Co. v. Shipman*, 233 Ill. 9; 84 N. E. Rep. 53.

until it has been taken from the ground and reduced to possession.^{49a}

§ 37. Waste—Part of realty—Reservation.

Where a tenant for life was taking out oil and gas, it was held that such oil and gas formed a part of the realty, that he could not drill wells in order to take out the oil or gas,⁵⁰ and that drilling a well and taking out gas or oil was an act of waste within the legal definition of that term.⁵¹ So in the case of an infant's lands, the guardian cannot drill a well, extract the oil or gas and sell it; nor can he dispose of it by way of lease or otherwise.⁵² The same is true of a guardian of an insane or incompetent person.⁵³ A conveyance of real estate, but reserving "all mines, mineral and metals in and under the land," is a reservation of the oil and gas.⁵⁴ A demise or con-

^{49a} *O'Neil v. Sun Co.*, 58 Tex. Civ. App. 167; 123 S. W. Rep. 172; *Smith v. Root*, 66 W. Va. 633; 66 S. E. Rep. 1005; *Watford Oil & Gas Co. v. Shipman*, 233 Ill. 9; 84 N. E. Rep. 53; *Moore v. Sawyer*, 167 Fed. 826; *McMillin v. Titus*, 222 Pa. 500; 72 Atl. Rep. 240; *Eastern Oil Co. v. Conlehan*, 65 W. Va. 531; 64 S. E. Rep. 836; *Kansas Natural Gas Co. v. Board*, 75 Kan. 335; 89 Pac. Rep. 750; *Bruner v. Hicks*, 230 Ill. 536; 82 N. E. Rep. 888; *Toothman v. Courtney*, 62 W. Va. 167; 58 S. E. Rep. 915; *Dodridge, etc., Co. v. Smity*, 154 Fed. Rep. 970; *New American Oil & Mining Co. v. Troyer*, 166 Ind. 402; 77 N. E. Rep. 739; 76 N. E. Rep. 253; *Graciosa Oil Co. v. Santa Barbara County*, 155 Cal. 140; 99 Pac. Rep. 483; *Richlands Oil Co. v. Morris*, 108 Va. 288; 61 S. E. Rep. 762; *Conklin v. Krandsky*, 127 App. Div. 660; 112 N. Y. Supp. 13; *Ulrey v. Poe*, 134 Ill. App. 298, affirmed 233 Ill. 56; 84 N. E. Rep. 46; *Backer v. Penn. Lubricating Co.*, 162 Fed. Rep. 627; *Richmond Natural Gas Co. v. Davenport*, 37 Ind. App. 25; 76 N. E. Rep. 525; *Dickey v. Coffeyville, etc., Co.*, 69 Kan. 106; 76 Pac. Rep. 398; *Carr v. Huntington L. & F. Co.*, 33 Ind. App. 1; 70 N. E. Rep. 552; *Headley v. Hoopengartner*, 60 W. Va. 26; 55

S. E. Rep. 744; *Gillespie v. Fulton Oil & Gas Co.*, 239 Ill. 326; 88 N. E. Rep. 192; *McConnell v. Pierce*, 210 Ill. 627; 71 N. E. Rep. 622; *McGraw Oil Co. & Gas Co. v. Kennedy*, 65 W. Va. 595; 64 S. E. Rep. 1027; *Ramage v. Wilson*, 45 Ind. App. 599; 88 N. E. Rep. 862.

⁵⁰ Though he could use the wells drilled before the life estate was established.

⁵¹ *Williamson v. Jones*, 43 W. Va. 562; 27 S. E. Rep. 411; 38 L. R. A. 694; 64 Am. St. Rep. 891; *Marshall v. Mellon*, 179 Pa. St. 371; 36 Atl. Rep. 201; 35 L. R. A. 816.

⁵² *Stoughton's Appeal*, 88 Pa. St. 198; *Ilaskell v. Sutton*, 53 W. Va. 206; 44 S. E. 533.

⁵³ *South Pennsylvania Oil Co. v. McIntire*, 44 W. Va. 296; 28 S. E. Rep. 922.

⁵⁴ *Murray v. Allard*, 100 Tenn. 100; 43 S. W. Rep. 353; 39 L. R. A. 249; 66 Am. St. Rep. 740; *McConnell v. Pierce*, 210 Ill. 627; 71 N. E. Rep. 622 (citing *Manning v. Frazier*, 96 Ill. 279).

A deed granting all of the one-half of the royalty, being one-sixteenth of all the oil and one-half of all the gas within certain land under a lease providing for delivery by the lessee of one-eighth of the oil and the payment of \$300 per year for each gas well used, grants

veyance of a tract of land, but reserving ten acres near the dwelling house on which no wells shall be drilled, is a conveyance of the oil and gas under the ten acres.⁵⁵ As between the first lessee and a second one where the latter takes out oil or gas without the consent of the first, such oil or gas must be treated, before it is extracted, as a part of the realty and the taking out of it as a waste.⁵⁶ It is not waste, however, for a landowner to put down wells near his boundary lines, though the effect be to draw the oil from beneath the surface of the adjoining land owned by another.⁵⁷ To extract it unlawfully is an irreparable injury which to stop or prevent injunction lies.⁵⁸

§ 38. Partition.

The granting of a mere mining right cannot maintain an action for partition as against his grantor.⁵⁹ Nor can the owners of mineral rights in oil and gas have partition, for the reason that neither gas nor oil is capable of distinct ownership so long as it is in place. Today they may form a part of the premises of the land occupied by their owner, but tomorrow they may have escaped and formed a part of the adjoining or even other land, without the volition or any act of their owners.⁶⁰

the right to have delivered by the lessee one-half of one-eighth of the oil and one-half of the rental. *Horner v. Philadelphia Co.*, 71 W. Va. 345; 76 S. E. 662.

⁵⁵ *Brown v. Spilman*, 155 U. S. 665; 15 Sup. Ct. Rep. 245, reversing 45 Fed. Rep. 291.

⁵⁶ *Bettman v. Harness*, 42 W. Va. 443; 26 S. E. Rep. 271; 36 L. R. A. 566; *Gillespie v. Fulton Oil & Gas Co.*, 239 Ill. 326; 88 N. E. Rep. 192.

⁵⁷ *Kelley v. Ohio Oil Co.*, 57 Ohio St. 317; 49 N. E. Rep. 399; 39 L. R. A. 765; 63 Am. St. Rep. 765; *Rumsey v. Sullivan*, 166 N. Y. App. Div. 246; 150 N. Y. Supp. 287; affirming judgment for rehearing, 154 N. Y. App. Div. 911; 148 N. Y. Supp. 1142.

⁵⁸ *Moore v. Jennings*, 47 W. Va. 181; 34 S. E. Rep. 793; *Gillespie v. Fulton Oil & Gas Co.*, 236 Ill. 188;

86 N. E. Rep. 219; *Haskell v. Sutton*, 53 W. Va. 206; 44 S. E. 533; *Bettman v. Harness*, 42 W. Va. 423; 26 S. E. 271; *Murray v. Allard*, 100 Tenn. 100; 66 Am. St. 740; *Isam v. Rex Crude Oil Co.*, 147 Cal. 659; 82 Pac. 317. The owner of the oil is not confined to his remedy by injunction, but may sue to recover damage for that which has been taken. *Campbell v. Smith*, 179 Ind. 240; 101 N. E. 889.

⁵⁹ *Smith v. Cooley*, 65 Cal. 46.

⁶⁰ *Hall v. Vernon*, 47 W. Va. 295; 34 S. E. Rep. 764; 49 L. R. A. 464. See *Carter v. Tyler County Court*, 45 W. Va. 806; 32 S. E. Rep. 216; 43 L. R. A. 725; *Watford Oil & Gas Co. v. Shipman*, 233 Ill. 9; 84 N. E. Rep. 53; *Beardsley v. Kansas Natural Gas Co.*, 78 Kan. 571; 96 Pac. Rep. 859; *Emery v. League*, 31 Tex. App. 474; 72 S. W. 603; *Preston v. White*, 57 W. Va. 278;

§ 39. Oil and gas not synonymous.

Oil and gas are not synonymous; and a lease for oil purposes does not embrace the right to take gas. If the lease requires the production of oil, the production of gas will not satisfy the covenant requiring a development, within a certain time, of the territory for oil.⁶¹

§ 40. "Other valuable volatile substances."

Where the phrase "other valuable volatile substances" was used in a lease in connection with the words "petroleum, rock or carbon oil," the court ordered the issue to be tried by a jury, whether or not natural gas was included in the words first quoted, for the reason that the words have no well defined meaning, and are ambiguous.⁶²

§ 41. Natural gas not heat.

Natural gas is not heat within the meaning of a statute providing for the incorporation of companies to supply heat.⁶³

§ 42. Gas and oil an article of commerce.

Both gas and oil are articles of commerce when severed from the soil, not, however, while remaining in it. When gas is carried from State to State it is an article of interstate commerce, though carried in pipe lines, as much so as coal, iron ore or any other mineral; and no greater restrictions can be laid upon it than can be laid upon solid minerals severed from the soil, or any other article of commerce. The carriage of oil and gas beyond the boundaries of that State can not be prohibited,⁶⁴ and State officers endeavoring to enforce a statute forbidding

50 S. E. 236; Ziegler v. Brenneman, 237 Ill. 15; 86 N. E. 597. See § 314.

⁶¹ Palmer v. Truby, 136 Pa. St. 556; 20 Atl. Rep. 516; Taylor v. Peerless Refining Co., 7 Ohio Dec. 368; 14 Ohio C. C. 315.

⁶² Ford v. Buchanan, 111 Pa. St. 31; 2 Atl. Rep. 339.

⁶³ Emerson v. Commonwealth, 108 Pa. St. 126; Lebanon Gas Co. v. Lebanon Fuel, etc., Co., 5 Pa. Dist. Rep. 529; 18 Pa. Co. Ct. Rep. 223.

⁶⁴ State v. Indiana, etc., Co., 120 Ind. 575; 22 N. E. Rep. 778; 6 L. R. A. 579; 29 Am. and Eng. Corp. Cas. 237; 2 Inter St. Com. Rep. 758. See Columbia Conduit Co. v. Com., 90 Pa. St. 307; West Virginia Transportation Co. v. Volcanic Oil and Coal Co., 5 W. Va. 382; Jamieson v. Indiana Natural Gas Co., 128 Ind. 555; 28 N. E. Rep. 76; 12 L. R. A. 652; 34 Am. and Eng. Corp. Cas. 1.

such carriage may be enjoined by the Federal courts.^{64a} The State has only an easement in its public highway and a statute forbidding a contract to the property owners to lay pipes over or across them, in order to prevent the carrying of natural gas out of the State, is void.^{64b}

§ 43. Judicial notice.

Courts will take judicial notice of the properties of petroleum, gas and natural gas, and that the latter is a highly inflammable and dangerous substance.⁶⁵ They will not, however, presume or take judicial notice that gas confined in an iron pipe is, in that condition, a dangerous element and liable to explode.⁶⁶ So the courts will take notice of the methods of operating for oil and gas, the means of their conduct to the points of consumption, and the facts of the odor and noise incident to their production.⁶⁷ Courts will also take judicial notice that coal oil is inflammable;⁶⁸ but they will not take judicial notice that kerosene oil is a refined coal oil, or a refined earth oil,⁶⁹ or a "burning fluid" or "chemical oil" as such words are used in a policy of insurance forbidding the use of

^{64a} *Kansas Natural Gas Co. v. Haskell*, 172 Fed. Rep. 545. When natural gas is piped from one state to another it does not lose its character as a subject of interstate commerce by reason of the fact that a small quantity of gas procured in the state in which it is sold is mixed with it. The enforcement by the state in which the sale is made of any law which substantially burdens the business, or renders it impossible to conduct it at a fair profit is an undue interference with interstate commerce, in violation of the commerce clause of the federal constitution. *Landon v. Public Utilities Commission*, 234 Fed. 152. See *Contra State v. Flannelly*, 96 Kans. 372; 152 Pac. 22.

^{64b} *Kansas Natural Gas Co. v. Haskell*, *supra*, affirmed West v. *Kansas Natural Gas Co.*, 221 U. S. 229; 31 Sup. Ct. 564; 55 L. Ed.

⁶⁵ *Jamieson v. Indiana, etc., Co.*, 128 Ind. 555; 28 N. E. Rep. 76; 12 L. R. A. 652; 34 Am. and Eng. Corp. Cas. 1; *Alexandria, etc., Co. v. Irish*, 16 Ind. App. 534; 44 N. E. Rep. 680;

Mississinewa Mining Co. v. Patton, 129 Ind. 472; 28 N. E. Rep. 1113; 28 Am. St. Rep. 203; *Indiana, etc., Co. v. Jones*, 14 Ind. App. 55; 42 N. E. Rep. 487; *Schmidt v. Union Oil Co.*, 27 Cal. App. 366; 149 Pac. 1014.

The court will take judicial notice that crude oil is of an inflammable character. *Texas & N. O. R. Co. v. Bellar*, 51 Tex. Civ. App. 154; 112 S. W. Rep. 323. "Natural gas will not explode until it is mixed with oxygen." *Harmel v. Brentford Gas Co.*, 13 Ont. W. Rep. 873.

A court will not take judicial notice that dry, fine coal dust is dangerous and an explosive element. *Cherokee, etc., Co. v. Wilson*, 47 Kan. 460; 28 Pac. Rep. 178.

⁶⁶ *Indiana, etc., Co. v. Jones*, *supra*.

⁶⁷ *Brown v. Spilman*, 155 U. S. 670; 15 Sup. Ct. Rep. 245; 39 L. Ed. 304; *Eastern Oil Co. v. Conlehan*, 65 W. Va. 531; 64 S. E. Rep. 836.

⁶⁸ *State v. Hayes*, 78 Mo. 307.

⁶⁹ *Bennett v. North British, etc., Ins. Co.*, 8 Daly 471.

such articles on the insured premises.⁷⁰ Where the Legislature had declared that certain grades and qualities of kerosene are proper and safe to use, it was decided that judicial notice could not be invoked to establish that kerosene used in a certain case was in fact inflammable or explosive.⁷¹ Nor will the courts take judicial notice that gin and turpentine are inflammable liquids, within the meaning of that term as used in an insurance policy that provides it shall be void if "inflammable liquids" are kept on the premises.⁷² But judicial knowledge will be taken that gas cannot be brought to the surface and stored to await a market for it; and that it must remain in the ground, and be taken out only when the owner of the ground may be able to find a customer for it, unless allowed to waste away.^{72a} Courts will take judicial notice of the dangerous character and explosive qualities of gasoline.^{72b} "We take judicial cognizance of the fact that gasoline, either alone or mixed with kerosene, constitutes a highly explosive agent, and that extreme care should be taken by the vendors thereof to prevent this mixture."^{72c}

§ 44. Judicial knowledge of oil and gas properties.

"It is well understood among oil operators that the fluid is found deposited in a porous sand rock, at a distance ranging from five hundred to three thousand feet below the surface. This rock is saturated throughout its extent with oil, and when the hard stratum overlying it is pierced by the drill, the oil and gas find vent, and are forced, by the pressure to which they are subject, into and through the well to the surface. After this pressure is relieved by the outflow, the wells become less active. The movement of the oil in the sand rock grows sluggish, and it becomes necessary to pump the wells both to quicken the movement of oil from the surrounding rock, and to

⁷⁰ *Mark v. National Fire Ins. Co.*, 24 Hun 565; affirmed 91 N. Y. 663.

⁷¹ *Wood v. N. W. Ins. Co.*, 46 N. Y. 421.

⁷² *Mosley v. Vermont, etc., Ins. Co.*, 55 Vt. 142.

^{72a} *Eastern Oil Co. v. Conlehan*, 65 W. Va. 531; 64 S. E. Rep. 836.

The court will also take judicial notice that mining for oil and gas is a hazardous and dangerous business, involving great risk and requiring large expenditures of money, and that by the usual terms of a lease the lessor reserves but one-eighth of the oil as a royalty, and the other seven-eighths goes to

the operator. *Garrett v. South Penn. Oil Co.*, 66 W. Va. 587; 66 S. E. 741.

^{72b} *Whittemore v. Baxter Laundry Co.*, 181 Mich. 564; 148 N. W. 437; 52 L. R. S. (N. S.) 930.

In Kansas the court takes judicial notice that coal mines generate inflammable gases, because a statute requires bore holes where working places in a coal mine are in close proximity to an abandoned mine suspected of containing inflammable gases. *Cheek v. Missouri K. & T. Ry. Co.*, 89 Kan. 247; 131 Pac. 617.

^{72c} *McLawson v. Paragon Refining Co. (Mich.)*, 164 N. W. 668.

lift it from the chamber at the bottom of the well to the surface. An oil or gas well may thus draw its product from an indefinite distance, and in time exhaust a large space. Exact knowledge on this subject is not at present attainable, but the vagrant character of the mineral, and the porous sand rock in which it is found and through which it moves, fully justify the general conclusion we have stated above, and have led to its general adoption by practical operators. For this reason, an oil lease partakes of the character of a lease for general tillage, rather than that of a lease for mining and quarrying the solid minerals."⁷³

§ 45. Plugging wells.

The state has the power to compel the owner of a disused or abandoned well to plug it, so gas will not escape into the open air, and thereby the gas not only be wasted, but the natural reservoirs be flooded with salt water to the destruction of the gas and the practical destruction of the oil.⁷⁴ So a statute empowering a neighboring landowner to enter on adjoining premises, plug a well that had been abandoned, and recover the cost of so doing from the landowner, is valid. It cannot be successfully contended that such a statute is invalid on the ground that the owners of gas wells may do as they please with gas after reducing it to possession; for the gas flowing from the pipes or coming from the gas meter is replaced by other gas coming from the well.^{74a}

⁷³ *Wettengel v. Gormley*, 160 Pa. St. 559; 28 Atl. Rep. 934; 40 Am. St. Rep. 733.

⁷⁴ *State v. Ohio Oil Co.*, 150 Ind. 21; 49 N. E. Rep. 1055; 47 L. R. A. 627; *Ohio Oil Co. v. Indiana*, 177 U. S. 190; 20 Sup. Ct. Rep. 576; *State v. Oak Harbor Gas Co.*, 53 Ohio St. 347; 41 N. E. Rep. 584; reversing 34 Wkly. L. Bull. 221; 18 Ohio C. Ct. Rep. 751; 1 Toledo Leg. News, 474; 4 Ohio C. C. 158; *Given v. State*, 160 Ind. 552; 66 N. E. Rep. 750; *Bailey v. State*, 163 Ind. 165; 71 N. E. Rep. 655; *Commonwealth v. Trent*, 117 Ky. 34; 77 S. W. Rep. 390; 25 Ky. L. Rep. 1180; *Dawson v. Shaw*, 28 Pa. Super Ct. 563; *McDonald v. Carlin*, 163 Ind. 342; 71 N. E. Rep. 961; *Steelsmith v.*

Aiken, 14 Pa. Super Ct. 226; *LaHarpe v. Elm Tp. Gaslight, etc., Co.*, 69 Kan. 97; 76 Pac. Rep. 448.

^{74a} *Commonwealth v. Trent, supra*.

A firm sunk a well for gas or oil, but, finding neither, they abandoned the well, without plugging it, as required by Burns' Ann. St. 1901, § 7511. Thereafter a third person became the holder of a gas and oil lease covering the premises. He sunk a well for gas or oil, but the work was interfered with by water from the abandoned well. He then plugged the latter well. The firm and the third person then agreed if the third person would furnish the firm with work in sinking wells he could take from the money due for such work the cost of plugging

§ 46. Not subject to tariff law of 1890.

Under the tariff law of 1890 natural gas imported as a fuel is not subject to a tariff duty under that clause of the statute providing that all imports of crude bitumen or crude mineral shall be admitted free; nor is it dutiable under the section providing that all raw or unmanufactured material not enumerated shall be dutiable.⁷⁵

§ 47. Entry of government oil lands.

By Acts of Congress of August 4, 1894, and of February 11, 1897, oil lands can be entered as placer mining claims.⁷⁶ "The premises in controversy are oil-bearing lands, the government title to which, under existing laws can alone be acquired pursuant to the provisions of the mining laws relating to placer claims."⁷⁷

§ 48. Property in oil in tanks or pipe lines—Larceny.

The presumption is that the person delivering oil to a pipe line company is the owner of it; and if the company deny his

the abandoned well. The third person furnished the firm with work. It was held, that the furnishing of work constituted a consideration for the undertaking to pay for the cost of plugging the abandoned well, whether or not such plugging was done in the manner provided by law. *McDonald v. Carlin*, 163 Ind. 342; 71 N. E. 961.

Where an oil and gas well is damaged from percolating water due to the failure of the owner of an abandoned well on adjacent land to plug it, the owner of the injured well may recover damages therefor, though he has leased the well and received no rental from it. And it was also held that both at common law and under the Virginia statute, where the covenant in the lease guaranteed to the lessor payment of rental and a supply of the gas developed, that he was entitled to recover for injury to the well occasioned by water percolating into the gas bearing sand from the abandoned unplugged well. *Atkins*

v. Virginia Gas & Oil Co., 72 W. Va. 707, 79 S. E. 647.

⁷⁵ *United States v. Buffalo, etc., Co.*, 172 U. S. 339; 19 Sup. Ct. Rep. 200; affirming 78 Fed. Rep. 110; 45 U. S. App. 345; 24 C. C. A. 4.

⁷⁶ See Land Office Circular, Oct. 12, 1892, 15 Land Dec. 760, and Instructions, 23 Land Dec. 322. For Act of 1897, see 29 Stat. at Large, 526, 2 Supp. R. S. 549.

⁷⁷ *Gird v. California Oil Co.*, 60 Fed. Rep. 531. This decision was rendered before the two Acts referred to above had been adopted. The Land Department at Washington, after much fluctuation, had reached the same conclusion. *Union Oil Co.*, on review, 25 Land Dec. 351. See *In re Piru Oil Co.*, 16 L. D. 117; *Roberts v. Jepson*, 4 L. D. 60; *Maxwell v. Brierly*, 10 Copps L. D. 50; *Ex parte Union Oil Co.*, 23 Land Dec. 222; *In re A. A. Dewey*, 9 Copps L. O. 51; *Dewey v. Rogers*, 2 Land Dec. 707; *In re Rogers*, 4 Land Dec. 284.

ownership, it has the burden of proving it.⁷⁸ Oil in a tank may be pledged; and a written order to the owner's agent in charge of the oil to hold it to the order of the pledgee as collateral security for a named sum of money transfers the oil to the pledgee on the agent's acceptance of such order.⁷⁹ Where B, the owner of several hundred barrels of oil in the pipes and tanks of the Union Pipe Line Company, delivered two orders on the company for the oil, which he had accepted, to the firm of H. & B. and took from them a receipt containing an agreement by them to hold the oil for storage at five cents a barrel per month, the oil at the time being in the tanks or pipe lines of the pipe-line company and undistinguishable from other oil in them; and H. & B. deposited the two orders to the credit of their general account with the pipe-line company, and afterwards deposited and drew until they became embarrassed, and, to meet their obligations, continued to draw on their balances on the books of the pipe-line company until they failed, it was held that they were guilty of larceny as bailees, on failure to comply with the demand of B. for a re-delivery of the oil. It was considered that the delivery of the receipts was a delivery of the oil and constituted a bailment, and H. & B. having converted the oil to their own use, the conversion was fraudulent, and they were guilty of larceny. The court said:

"In the consideration of the questions involved in this case, we cannot close our eyes to the total revolution in the manner of doing business, which has been brought about by the discovery of petroleum in this State. It has developed a new industry of vast importance. Methods for conducting it have been devised and put in operation, which were wholly unknown when the cases I have cited were decided. Instead of oil being hauled a long distance from the well to a market or shipping station, and there stored in barrels or in tanks in a merchant's ware-rooms, it is now turned at once by the producer into the pipes of the Pipe-Line Company, and thence conducted to the line of the railroad or canal for shipment, or may be in said pipes, or the

⁷⁸ *Enterprise Oil and Gas Co. v. National Transit Co.*, 172 Pa. St. 421; 33 Atl. Rep. 687.

⁷⁹ *First National Bank v. Harkness*, 42 W. Va. 156; 24 S. E. Rep. 548; 32 L. R. A. 408.

tanks connected therewith. Each producer knows that his oil is mixed with the oil of other producers. Each barrel of oil in the pipes is the precise counterpart of every other barrel contained therein. It differs neither in quantity, quality or price. The oil is sold and passes from hand to hand upon the accepted orders or certificates of the Pipe-Line Company. . . . Thousands of barrels of oil are sold and delivered daily in the market upon similar orders. No one doubts that the property passes; that the orders drawn to them are the constructive possession, and that the delivery of said orders is a symbolical delivery of the oil. . . . How can these defendants allege with reason that as to them there was no delivery, when, in point of fact, they drew the oil out of the pipes and applied it to the payment of their debts? If it had not been drawn out, it would have been in the pipes still to meet the demand of the prosecutor. Even if delivery of the orders was not a complete delivery of the oil at that time, such delivery became complete when the defendants drew it out, or enabled others to draw it out by a transfer of the orders. It would render the law contemptible in the eyes of the business men, were it to say that there was no delivery of this oil when, as a matter of fact, there was a delivery for all the purposes of trade and commerce; such a delivery as enabled the defendants to sell it and apply the proceeds to the payment of their debts." And further: "If there was a delivery of the oil, of which we have no doubt, it follows necessarily that there was a bailment. This brings us to the further question whether the defendants fraudulently converted it to their own use. This point is free from difficulty. It is a fraud *per se* for a bailee to convert to his own use the property committed to his care. The conversion is, *prima facie*, evidence of the fraud. Larceny at common law involves something more. It requires the *animus furandi*. There must be a felonious taking. Not so with larceny as bailee. It requires merely a fraudulent conversion. . . . In the case of a bailment, therefore, so far as the intent to defraud may be regarded as of the essence of the crime, it must be presumed from the unlawful conversion. If I deposit my pocketbook for safe keeping over night with my landlord, and he opens it and converts the contents to his own

use, he is a thief both in law and in morals. Nor does it matter that he parted with it to pay his debt under stress of an execution, with the intention of restoring it to me ultimately. . . . But it is said that the defendants were bankers in oil, and that the case resembled that of the ordinary banker who receives money upon deposit. It is difficult to see the analogy. By the laws and the usage of banking, the depositor who makes a general deposit of his money becomes a mere creditor of the banker. The money becomes property of the banker. He has a right to use it in his legitimate business. He may loan it out to his customers upon such security and upon such terms as are usual with bankers. No such state of facts exists here. The defendants acquired no property in nor right to use the prosecutor's oil. . . . They had no right to lay their hands upon the property of the prosecutor, confided to them for safe keeping, in order to relieve themselves." ⁸⁰

⁸⁰ *Hutchison v. Com.*, 82 Pa. St. 472.

CHAPTER III.

OIL AND GAS LEASES.

- § 49. Peculiarity.
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- § 51. *Lex loci* governs.
- § 52. License and incorporeal hereditaments.
- § 53. Interest of lessee is a chattel real.
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- § 73. Acceptance of second lease by lessee in first lease.
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- § 76. Options.—Revocation.
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- § 112. Damages for failure to keep covenant.
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- § 114. Damages for neglect to operate.—*Res judicata*.
- § 115. Damages for taking oil or gas.
- § 116. Damages.—Measure of.—Proof.
- § 117. Damages reasonable where diligence has been used.
- § 118. Damages because of removal of casing.
- § 119. Boundaries.—Location of wells.
- § 120. Selection of site.
- § 121. Number of wells.
- § 122. Number of wells.—Protecting lines.
- § 123. Test wells.—Excuse for not drilling.
- § 124. Test well, when need not be drilled.
- § 125. Test well.—Depth.
- § 126. Lessor and lessee by mistake locating well on stranger's land.
- § 127. "Shooting" well.
- § 128. Oil lease, who entitled to gas.
- § 129. Oil lease gives no right to gas if oil be not found.
- § 130. Eviction.—Ejectment.
- § 131. Failure of title, reimbursement of operator.
- § 132. Lessee denying tenancy.
- § 133. Uncertainty on lease.—Unconscionable.
- § 134. Diameter of wells.
- § 135. Contract to drill wells "in the vicinity."
- § 136. Surrender clause and its effect.—Ejectment.—Specific performance.
- § 137. Slander of title.

§ 49. Peculiarity.

Gas and oil leases are a part by themselves. There is scarcely any comparison between them and the ordinary farm or house lease; although there is some resemblance in them to coal or solid mineral leases. Usually an oil or gas lease is for a term of a certain number of years, upon a nominal consideration, sometimes with the privilege of an extension of the term at the option of the lessee, or as long as gas or oil is found in paying quantities; contains a description of the leased territory, and a reservation of a certain number of acres around the buildings, when any are on the leased premises, where no wells shall be drilled; if the boundaries of the reservation are not fixed, provides that they shall be fixed by one of the parties, usually the owner of the land; provides for a part of the oil produced as a royalty or consideration for the lease, except for operating purposes, delivered in tanks or pipe lines to the credit of the lessor; provides, in case only gas should be discovered, for the payment of a certain sum periodically, for each well, if the gas be found in a quantity to justify transporting it off the premises to a market, of which fact the lessee is sometimes made the exclusive judge; the growing crops and the fences, not to be unnecessarily disturbed; gives the lessee or grantee the right to enter on the premises at any time to drill wells, and a right of way to and from the wells, the right to lay pipe lines to carry off the gas and oil, the right to remove all fixtures used in the drilling and operation of the wells, at the termination of the lease or grant; the lessee agreeing to commence a well within a certain time, and in case of a failure to do so to pay for any future delay a certain sum periodically (frequently so much per acre of the entire tract) as a rental until a well is commenced or the premises abandoned, the amount thus paid not infrequently made a full consideration and payment for the yearly delay until a well shall be commenced; and provides that a failure to commence a well or to make the payments within the specified time

shall render the lease void. We say these are the usual terms. There are often many others, such as a thirty days' notice on the part of the lessee or grantee of his determination to terminate or surrender the lease; or that a second or other wells shall be drilled within a specified time after the first well is drilled, and if not, the lease to be void or forfeited; or that the lessor or grantor is to receive so much gas free of charge, giving the lessee the exclusive right to develop the lands, and the like. The number of conditions are many, as will appear further on in this chapter, and it is unnecessary here to further enumerate them.¹

§ 50. Name applied to instrument does not determine its legal effect.

In determining the scope and legal effect of an instrument giving rights and privileges to mine or take mineral, oil or gas, it is immaterial by what name it is called, whether a "lease," "contract," "grant," or "deed of conveyance," the courts will look to the language used in the instrument, aside from these terms so used, and determine its legal effect. The most commonly used term is the word "lease," and yet many such an instrument has been considered as giving an estate of inheritance, which in fact made it a deed of conveyance.²

¹ *Rives v. Gulf Refining Co.*, 133 La. 178; 62 So. 623; *Cooke v. Gulf Refining Co.*, 135 La. 609; 65 So. 758. See *Simpson v. Pittsburgh, etc., Co.*, 28 Ind. App. 343; 62 N. E. Rep. 753. Cited, *Graciosa Oil Co. v. Santa Barbara County*, 155 Cal. 140; 99 Pac. Rep. 483; 20 L. R. A. (N. S.) 211.

² *Hobart v. Murray*, 54 Mo. App. 249; *Suffern v. Butler*, 21 N. J. Eq. 410, affirming 4 C. E. Gr. (N. J.), 202; *Genet v. Delaware, etc., Co.*, 136 N. Y. 593; 32 N. E. Rep. 1078, reversing 122 N. Y. 505; 25 N. E.

Rep. 956; *Sanderson v. Scranton*, 105 Pa. St. 469; *Delaware, etc., Co. v. Sanderson*, 109 Pa. St. 583; *Hope's Appeal*, 29 W. N. C. (Pa.), 365; *Kingsley v. Hillside, etc., Co.*, 144 Pa. St. 613; 23 Atl. Rep. 250; *Plummer v. Hillside, etc., Co.*, 160 Pa. St. 483; 28 Atl. Rep. 853; *Moore v. Miller*, 8 Pa. St. 272; *Cary Hardware Co. v. McCarty*, 10 Colo. App. 200; 50 Pac. Rep. 744; *Lambie v. Sloss, etc., Co.*, 118 Ala. 427; 24 So. Rep. 108; *Hodgson v. Perkins*, 84 Va. 706; 5 S. E. Rep. 710; *Shenandoah Land, etc., Co. v. Hise*, 92

§ 51. *Lex loci governs.*

The rights of the parties must be determined by the law of the State where the leased premises lie, although it be executed in another State where the lessor and lessee reside.³

§ 52. *License and incorporeal hereditaments.*

If one grant in writing a privilege to mine in his lands, he creates an incorporeal hereditament; if he grant by parol the same privilege, he simply constitutes a license. A license is a mere personal privilege, while an incorporeal hereditament is an interest in lands. This distinction is not always observed, and, when not, confusion arises. A license may, however, be

W. Va. 238; 28 S. E. Rep. 303; Logansport, etc., Gas Co. v. Hull, 36 Ind. App. 503; 76 N. E. Rep. 125; Stahl v. Illinois Oil Co., 45 Ind. App. 211; 90 N. E. Rep. 632; Collier v. Munger, 75 Kan. 550; 89 Pac. Rep. 1011; Superior Oil & Gas Co. v. Mehlin, 25 Okl. 809; 108 Pac. Rep. 545; Kelly v. Harris (Okl.), 162 Pac. 219; Morton v. Drosten (Mo. App.), 185 S. W. 733. An oil lease is property. *In re* Indian Territory Aluminating Oil Company, 43 Okl. 316, 142 Pac. 100.

Instruments concerning the development of lands for oil or gas are construed in the light of the fact that the principal purpose of the owner of the land in giving the contracts or leases is to procure the exploration of the land for oil and gas, to be followed by the development of it if circumstances warrant. Dill v. Frazee, 165 Ind. 53; 79 N. E. Rep. 971; Conklin v. Krandsky, N. Y., 112 N. Y. Supp. 13.

An agreement for the use and occupation of land in consideration of a portion of the product of oil

developed therefrom is a lease, irrespective of its form or the designation given it by the parties. Cummings v. Guaranty Oil Co. (Cal. App.), 154 Pac. 882. A mineral lease, partaking of the nature of a lease as well as of a sale, and not appearing to have been provided for by any statute, is deemed to be a lease, and the laws relative to ordinary leases applies thereto so far as possible. Spence v. Lucas, 138 La. 763, 70 So. 796.

³ Genet v. Delaware, etc., Co., 35 N. Y. Supp. 147; 13 N. Y. Misc. Rep. 409.

In granting relief in equity the Federal Courts will not give relief according to local laws, but according to the general principles of equity as administered in those courts. Guffey v. Smith, 237 U. S. 101, 35 Sup. Ct. 526, 59 L. Ed. 855; reversing 202 Fed. 106, 120. See C. A. 436; Shafer Marks, 241 Fed. 139; Kuhn v. Fairmount Coal Co., 215 U. S. 360; 30 Sup. Ct. 140; 34 L. Ed. 228.

reduced to writing, or created in writing by the use of apt words. When privileges are granted by a writing, the writing alone determines the character or legal nature of the privilege granted.⁴

§ 53. Interest of lessee is a chattel real.

Whatever rights an operator receives, unless he operates under a parol license, he receives by virtue of the written instrument under which he operates, and to that instrument we must look to determine what legal interest he has in the premises. But restricting ourselves to a lease, as such purely, the question arises, "What interest has the lessee in the leased premises?" In the case of an agricultural lease, or the lease of a house or building, for a term of years, the interest of the lessee is easily defined by means of the decisions of courts running back many hundreds of years. But in the case of an oil or gas lease, where the length of the term is contingent on the discovery of gas or oil in paying quantities, and on its continuance in such quantities, although limited to a specified number of years, with a right to take and carry away a part of the soil itself, a very different question is presented. The interest of a lessee under such a lease has been termed a chattel real, and not a partnership

⁴ See *Nego v. Barber, etc., Co.*, 17 Mo. App. 294; *East Jersey Co. v. Wright*, 32 N. J. Eq. 248; *Stahl v. Illinois Oil Co.*, 45 Ind. App. 211; 90 N. E. Rep. 632; *Kansas Natural Gas Co. v. Board*, 75 Kan. 335; 89 Pac. Rep. 750; *Priddy v. Thompson*, 204 Fed. 955, 123. See C. A. 277; *McKean Natural Gas Co. v. Wolcott*, 254 Pa. 323, 98 Atl. 955.

An agreement granting the right to explore for oil was held a license rather than an estate in the land, in *Mitchell v. Probst (Okl.)*, 152 Pac. 597.

Oil taken out under a license is the property of the licensee. *Spring-*

field Foundry, etc., Co. v. Cole, 130 Mo. 1; 31 S. W. Rep. 922; *East Jersey Co. v. Wright, supra*; *Grubb v. Bayard*, 2 Wall. Jr. 81; *Clement v. Youngman*, 40 Pa. St. 341; *Algonquin Coal Co. v. Northern, etc., Co.*, 162 Pa. St. 114; 28 Atl. Rep. 402; *Lee v. Bumgardner*, 86 Va. 315; 10 S. E. Rep. 3; *Gillett v. Treganza*, 6 Wis. 343; *Shepherd v. McCalmont Oil Co.*, 38 Hun 37; *Tipping v. Robbins*, 71 Wis. 507; 37 N. W. Rep. 427.

Merely designating the instrument as a lease does not make it so. *Jennings Bros. & Co. v. Beale*, 158 Pa. St. 283; 27 Atl. Rep. 948.

asset.⁵ "The contract referred to was a lease of the lands for a specified term," said the Supreme Court of Pennsylvania, "and for a particular purpose, at a fixed rent or royalty reserved out of the production. As to the legal force and effect of the writing there can, we think, be no doubt; it conveyed an interest in the land; in this respect it is distinguished from a license." "But although the writing is a lease, it conveyed an interest in the land—a chattel interest, however; the lease was a chattel real, but none the less a chattel."⁶ Such an interest may be

⁵ *Chamberlain v. Dow*, 16 W. N. C. (Pa.) 532.

A contract recited that, in consideration of \$1 and of a royalty, grantor granted to decedent all the bituminous rock and other minerals he might choose to mine, quarry, and take from certain land; that in case the land failed to produce minerals in paying quantities or of good quality, decedent might, upon thirty days' notice in writing, relinquish his rights, and that decedent should pay royalty on 300 tons annually, whether taken or not. After the contract was executed, decedent quarried and took away twenty-seven tons of rock, after which he removed his machinery, and never conducted further operations up to his death, fifteen years later, though he paid royalty for two years. It was held that the contract was not a grant of land nor a lease, but a grant of a right in the nature of an incorporeal hereditament, and that all the rights of decedent's heirs were extinguished by the abandonment of the privileges. *Payne v. Neuval*, 155 Cal. 46; 99 P. 476.

⁶ *Brown v. Beecher*, 120 Pa. St. 590; 15 Atl. Rep. 608; *McElwaine's Appeal*, Pa., 11 Atl. Rep. 453. See

Ohio Oil Co. v. Kelley, 9 Ohio C. Ct. Rep. 511; 6 Ohio Cir. Dec. 470; 40 L. Bull. 338; 3 Ohio Dec. 186; *Greensburg Fuel Co. v. Irwin, etc., Co.*, 162 Pa. St. 78; 29 Atl. Rep. 274; *First Nat. Bank v. Dow*, 41 Hun 13; *McKean Natural Gas Co. v. Wolcott*, 254 Pa. 323; 98 Atl. 955; *Duff v. Keaton*, 33 Okl. 92; 124 Pac. 291.

A conveyance of all the (solid) minerals, or a defined part or kind thereof, in a tract of land, passes an estate in fee. *McConnell v. Pierce*, 210 Ill. 627; 71 N. E. Rep. 622; *Manning v. Frazier*, 96 Ill. 279.

"But the contract in question vests no present title in a stratum in place. It leaves the title to the oil in the landowner until it is brought to the surface. The right vested in plaintiff is an estate for years, so far as necessary for the purpose of taking oil therefrom, and it carries with it the right to extract the oil and remove it from the premises. The right constitutes, for the term prescribed, a servitude on the land, and a chattel real at common law." *Graciosa Oil Co. v. Santa Barbara County*, 155 Cal. 140; 99 Pac. Rep. 483; 20 L. R. A. (N. S.) 211, citing this section.

sold on execution, the purchaser being regarded as an assignee.⁷ If the lessee mortgage his interest, the mortgage must be executed in accordance with the law relating to a chattel mortgage.⁸

§ 54. Contract giving interest in real estate.

A contract concerning oil or gas lands may be so drawn as to give an interest in the premises granted, that can only be conveyed or assigned in writing. This was held to be true of a grant of "all the oil and gas in and under" a certain tract of eighty acres of land, with the right to enter thereon at all times for the purpose of drilling and operating for oil or gas, to erect structures and lay pipes, and excepting and reserving a certain part of the oil produced and saved from the premises. If gas were found, certain annual rental for each well while the gas was used off the premises was to be paid, and the grantor was to have free gas for his dwelling houses and for domestic purposes. There were other provisions with respect to forfeiture, if wells were not sunk within a certain time. The conditions between the parties were expressly extended "to their heirs, executors and assigns." The owner of the land had the right to cultivate the soil. The grant was unlimited in time. "The contract is not the form of a lease of the land," said the court, "or any part of it, for years or for life or in perpetuity, with an accompanying right, as an incident of the letting, of taking the oil and gas beneath the surface." In discussing the nature of this contract, the court used the following language: "While for reasons we have sought to state, we do not regard the contract in suit as a grant of land, or as a lease properly so-called, but do regard it as a grant of a right in the nature of an incorporeal hereditament, operative from the time of its execution and during the accomplishment of its purpose as a transfer of an exclusive right

⁷ *Aderhold v. Oil Well Supply Co.*, (N. P.) 153; 12 Ohio C. C. 723; 158 Pa. St. 401; 28 Atl. Rep. 22. 4 Ohio C. Dec. 248. See *Willeys v.*

⁸ *Devine v. Taylor*, 1 Ohio Dec. Brown, 42 Hun 140.

to search for, take and appropriate the minerals mentioned in the instrument, under whatever technical common law term it may most properly be classed, it must be held to be a conveyance of an interest in land within the meaning of our statutes." In discussing the nature of the grant, or contract, the court used the following language:

"The grant is not limited to any period of time, though as in the case of a grant of the coal in certain land, it would cease to be operative whenever it should be found that no oil or gas was beneath the soil, or none that could be taken with benefit; whereas a lease of land, properly so-called, would continue in force according to its provisions until the end of the term. The contract is in effect a grant of the right to take all the oil and gas that may be found and taken by making wells as prescribed upon the particular tract of land, with accompanying incidental rights to do, as indicated in the contract, upon the surface, those things needed for the enjoyment of the principal right so to take oil and gas. It confers rights not limited as to time, unless it be as to the indefinite period within which oil or gas may be taken advantageously under the conditions prescribed. The right to take all the oil and gas in and under the land is in its nature an exclusive right. It is inconsistent with a right in the grantor or others under him to take any of the oil or gas from beneath the designated land, at least through wells drilled upon that land. The oil and gas in their free and natural state within the land constitute a part of it, though they be fluent and liable to depart to other land, there to be taken into possession through wells made for such purpose. The right to take such minerals from the land constitutes an interest in the land. The instrument under consideration does not create a mere personal privilege to take the minerals from the land. It is an exclusive and assignable interest in land. If with propriety it can be called a license, it must be a license coupled with an interest in land. By its terms the contract is a grant of the minerals in and under the land. If by such general terms all of the specified solid mineral, as coal, in and under the land were granted, it would be a grant of real estate; but because of the fluidity and fugitiveness of petroleum and natural gas the absolute ownership of these mineral substances within the land cannot be acquired without reducing them to actual control; so

that a distinction must be and is made between these elusive minerals in and under the ground and the solid minerals in place in the earth. Therefore, a grant of all the oil and gas in and under a tract of land is not a grant of any particular specific substance as would be a grant of the coal in and under certain land. The owner of land is not by virtue of his proprietorship thereof the absolute owner of the oil and gas in and under it, in its free and natural state, not yet reduced to actual control of any person, but he, together with the other owners of land in the gas field, has a qualified ownership, consisting of or amounting to his exclusive right to do what may be done on, through and under his land (as making of wells) necessary to reduce the minerals to his possession, and by thus acquiring the exclusive control to become the owner of the mineral substances as his personal property, observing due regard in his operations to the like enjoyment of such exclusive right by all other landowners in like circumstances. This exclusive right is his private property. He cannot grant more than he owns; therefore, by granting all the oil and gas in and under his land, he does not grant more than a right to reduce to ownership the oil and gas which may be obtained by operating on the land, whereby substances which at the time of the making of the grant may be in and under lands of other surface properties may come into rightful ownership of the grantee as his personal property. Though, because of the peculiar nature of oil and gas, a corporeal interest in them in place cannot be created, and title to the specific mineral substances cannot be acquired without the reduction of them first to personal property, yet the exclusive and assignable right to do this with the accompanying rights necessary to such accomplishment, constitutes, not a privilege revocable before it has been acted upon, but a subsisting, exclusive, assignable and irrevocable right which accrues upon the execution of the written instrument of conveyance and before any action has been taken thereunder. The right so created is not susceptible of livery of seizin, and is in the nature of an incorporeal hereditament. The contract before us cannot be regarded as a lease of land for three years or less, or as a lease of land ineffectual because of uncertainty or indefiniteness of duration of term; and occupancy thereunder cannot be regarded as a tenancy from year

to year; but the interest granted is properly to be considered as an interest in land within the meaning of our statutes."⁹

§ 55. Estate does not vest if oil or gas not found.

There is an implied condition in every lease given for oil or gas mining purposes that if oil or gas be not found in such quantities as will justify its operation, within the time stipulated, or within a reasonable time where no time is specified, no estate shall pass by it and vest in the lessee. Contrasting an oil lease with a coal lease, the Supreme Court of Pennsylvania said: "A vested title cannot ordinarily be lost by abandonment in a less time than that fixed by the statute of limitations, unless there is satisfactory proof of an intention to abandon. An oil lease stands on quite different ground. The title is inchoate and for purposes of exploration only, until oil is found. If it is not found, no estate vests in the lessee, and his title, whatever it is, ends when the unsuccessful search is abandoned. If oil is found, then the right to produce becomes a vested right, and the

⁹ *Heller v. Dailey*, 28 Ind. App. 555; 63 N. E. Rep. 490. See *Gadbury v. Ohio, etc., Gas Co.*, 162 Ind. 9; 67 N. E. Rep. 259; 62 L. R. A. 895; *Stahl v. Illinois Oil Co.*, 45 Ind. App. 211; 90 N. E. Rep. 632; *Priddy v. Thompson*, 204 Fed. 955; 123 C. C. A. 277; *Frank Oil Co. v. Belleview Gas and Oil Co.*, 29 Okl. 719; 119 Pac. 260; 43 L. R. A. (N. S.) 487; *Kolachny v. Golbreath*, 20 Okl. 780; 110 Pac. 902; 38 L. R. A. (N. S.) 451.

Under a statute providing that "land" and "real estate" of a city "include rights and easements of an incorporeal nature," an oil lease owned by a city is real estate. *Kerlin Bros. Co. v. Toledo*, 20 Ohio C. Ct. Rep. 603; 8 Ohio N. P. 62.

An instrument concerning coal lands, setting forth that the owner does "grant, bargain and sell" the coal beneath the surface, and adding words of inheritance, presumptively, a contrary intent not being

affirmatively shown, shows that the owner intended to vest in the grantee the entire ownership of the coal in the land described. *Hosack v. Crill*, 204 Pa. 97, 53 Atl. Rep. 641.

The words "grant and lease" of lands to the grantees, their heirs and assigns, for the purpose of a gas well, so long as it is used for the same, amounts merely to a covenant for quiet enjoyment on the conditions stipulated in the contract. *Shenk v. Stahl*, 35 Ind. App. 493; 74 N. E. Rep. 538.

In New York while a right to operate for oil under a case in personal property, yet by section 39 of the General Construction law, the perpetual exclusive right to operate cannot be created except as provided by section 259 of the Real Property Law. *De Hart v. Enright*, 93 N. Y. Misc. Ref. 213; 157 N. Y. Supp. 46.

Under the Oklahoma statutes a lease is an interest relating to real

lessee will be protected in exercising it in accordance with the terms and conditions of his contract." "He [the lessee] could abandon whenever he was satisfied, from the search made, that the further expenditure of time and money upon any given farm, or upon the body of farms covered by his leases, would be fruitless. Whenever he did so abandon a given farm, or the whole body of leased farms to which his contract referred, his rights therein were at an end."¹⁰ In a *nisi prius* court of that State, the following language was used with reference to an oil lease executed as early as 1864: "The contract is peculiar and one of those instruments to which the development of the oil business has given rise. It is not a grant of land, or a present leasehold interest therein. It is not a grant of the mineral, etc., in place or under the land, but the right to search for oil, etc., and the right to enter and occupy for the purpose of such search and no other. If the search is fruitless, it is at the cost of the explorer. When the search is abandoned, the right of entry is gone. But, if the search is successful, then the explorer becomes a tenant for the purpose of operating the land at the rent agreed, and his right of possession exists, not for the purpose of search, but for the purpose of operating the oil or minerals

estate, though not arising to the dignity of an estate, prior to an entry by the lessee; it is property. The lessee has a vested interest to enter and explore; and he may sell and transfer his lease. *Shaffer v. Marks*, 241 Fed. Rep. 139.

¹⁰ *Venture Oil Co. v. Fretts*, 152 Pa. St. 451; 25 Atl. Rep. 732; *Steel-smith v. Gartlan*, 45 W. Va. 27; 29 S. E. Rep. 978; 44 L. R. A. 107; *Huggins v. Daley*, 99 Fed. Rep. 606; 40 C. C. A. 12; 48 L. R. A. 320; *Gadbury v. Ohio, etc., Gas Co.*, 162 Ind. 9; 67 N. E. Rep. 259; 62 L. R. A. 895; *Kelly v. Harris* (Okl.), 162 Pac. 219.

By appropriate technical terms, a deed granted all the oil and gas under a tract of land, together with the exclusive right to enter thereon at all times in order to drill and operate for oil and gas. It limited the estate to a term of seven years,

and as much longer as oil or gas might be found in paying quantities, and stipulated for the payment of commutation money for delay in drilling, calling it "rental," and provided for the delivery into pipe lines, for the grantor, of one-eighth of all oil produced and saved from the premises, and also for payment of a yearly rental for every gas well from which gas was transported and used off of the premises. It was held not to pass the title to the oil and gas in place, it in effect being a mining lease, and the title to the oil and gas in place remaining in the grantor. *Toothman v. Courtney*, 62 W. Va. 167; 58 S. E. Rep. 915, distinguishing *State v. Low*, 46 W. Va. 451; 33 S. E. Rep. 271. See, also, *Graciosa Oil Co. v. Santa Barbara County*, 155 Cal. 140; 99 Pac. Rep. 483; 20 L. R. A. (N. S.) 211.

which his search has discovered. Whether the tenancy exists depends, therefore, on whether the oil which is its object is found to exist upon the land."¹¹ If the lessee has the right to abandon the lease after operations begun, and remove all his property from the premises, and he abandon such operations, the lease is at an end.¹²

¹¹ *McNish v. Stone*, reported in note to 152 Pa. St. 457; 23 Pittsb. L. J. (N. S.) 232. Ruling followed in *Crawford v. Ritchie*, 43 W. Va. 252; 27 S. E. Rep. 220; *Elk Fork Oil and Gas Co. v. Jennings*, 84 Fed. Rep. 839; *May v. Hazelwood Oil Co.*, 152 Pa. St. 518; 25 Atl. Rep. 564; *Stage v. Boyer*, 183 Pa. St. 560; 38 Atl. Rep. 1035; *Kenton Gas, etc., Co. v. Dorney*, 17 Ohio Cir. Ct. Rep. 101; 9 Ohio Cir. Dec. 604; *Eaton v. Allegany Gas Co.*, 122 N. Y. 416; 25 N. E. Rep. 981, reversing 42 Hun 61; *Huggins v. Daley*, 99 Fed. Rep. 606; 40 C. C. A. 12; 48 L. R. A. 320; *Petroleum Co. v. Coal, etc., Co.*, 89 Tenn. 381; 18 S. W. Rep. 65; *Muhlenberg v. Henning*, 116 Pa. St. 138; 9 Atl. Rep. 144; *Cleminger v. Baden Gas Co.*, 159 Pa. St. 16; 33 W. N. C. 480; 28 A. Rep. 293; *Miller v. Balfour*, 138 Pa. St. 183; 22 Atl. Rep. 86; *Foster v. Elk Fork, etc., Co.*, 90 Fed. Rep. 178; 61 U. S. App. 576; 32 C. C. A. 560; *McGraw Oil & Gas Co. v. Kennedy*, 65 W. Va. 595; 64 S. E. Rep. 1027; 28 L. R. A. (N. S.) 959; *New American Oil, etc., Co. v. Troyer*, 166 Ind. 402; 76 N. E. Rep. 253; 77 N. E. Rep. 739; *Conkling v. Krandsusky*, 127 App. Div. 761; 112 N. Y. Supp. 13; *Doddridge, etc., Co. v. Smity*, 154 Fed. Rep. 970; *Toothman v. Courtney*, 62 W. Va. 167; 58 S. E. Rep. 915; *Breener v. Hicks*, 230 Ill. 536; 82 N. E. Rep. 888; *Kansas Nat. Gas Co. v. Board*, 75 Kan. 335; 89 Pac. Rep. 750; *Eastern Oil Co. v. Coulehan*, 65 W. Va. 531; 64 S.

E. Rep. 836; *Watford Oil & Gas Co. v. Shipman*, 233 Ill. 9; 84 N. E. Rep. 53; *Smith v. Root*, 66 W. Va. 633; 66 S. E. Rep. 1005; 30 L. R. A. (N. S.) 176; *O'Neil v. Sun Co.*, Tex. Civ. App., 123 S. W. Rep. 172; *Ramage v. Wilson*, 45 Ind. App. 509; 88 N. E. Rep. 862; *Gillespie v. Fulton Oil & Gas Co.*, 239 Ill. 326; 88 N. E. Rep. 192; *Headley v. Hoopengartner*, 60 W. Va. 26; 55 S. E. Rep. 744; *Dickey v. Coffeyville, etc., Co.*, 69 Kan. 106; 76 Pac. Rep. 398; *Richmond Natural Gas Co. v. Davenport*, 37 Ind. App. 25; 76 N. E. Rep. 525; *Backer v. Penn. Lubricating Co.*, 162 Fed. Rep. 627; *Ulrey v. Poe*, 134 Ill. App. 298; affirmed 233 Ill. 56; 84 N. E. Rep. 46; *Richlands Oil Co. v. Morris*, 108 Va. 288; 61 S. E. Rep. 762; *Graciosa Oil Co. v. Santa Barbara County*, 155 Cal. 140; 99 Pac. Rep. 483; 20 L. R. A. (N. S.) 211; *Moore v. Sawyer*, 167 Fed. Rep. 826; *Rawlings v. Armel*, 70 Kan. 778; 79 Pac. Rep. 683. See *Natural Gas Co. v. Harris*, 79 Kan. 167; 100 Pac. 272; *Frank Oil Co. v. Bellevue Gas & Oil Co.*, 29 Okl. 719; 119 Pac. 260; 43 L. R. A. (N. S.) 487.

¹² *Paine v. Griffiths*, 86 Fed. Rep. 452; 58 U. S. App. 38; 30 C. C. A. 182.

Where a person invaded, with notice, the right of another under a lease to explore the premises for oil and gas, he was enjoined, and held to forfeit whatever work he had done, but he was permitted to re-

§ 56. Vesting title subject to condition precedent—Diligence.

"While most of the cases¹³ have gone upon the ground of abandonment, the governing principle in all oil leases of the character under consideration is that the discovery and production of oil is a condition precedent to the continuance or vesting of any estate in the demised premises; that such leases vest no present title in the lessee, and if, at any time, the lessee has the option to suspend operations, the lease is no longer binding on the lessor because of want of mutuality; and, where the only consideration is prospective royalty to come from exploration and development, failure to explore and develop renders the agreement a mere *nudum pactum*, and works a forfeiture of the lease, for it is of the very essence of the contract that work should be done. And, the smaller the tract of land, the more imperative is the need for prompt and efficient drilling; for oil operations cumber the land, rendering it unavailable for agricultural purposes. The landowner is entitled to his royalty as promptly as it can be had. The danger of damage from his small holding is increased by delay, and the resulting damage, not being susceptible of pecuniary measurement, is therefore not compensable. No such lease should be so construed as to enable the lessee who has paid no consideration to hold it merely for speculative purposes, without doing what he stipulated to do, and what was clearly in the contemplation of the lessor when he entered into the agreement."¹⁴

move the machinery and materials used in drilling wells or in pumping, conveying and storing oil, which are not a part of the wells themselves. *Gillespie v. Fulton Oil & Gas Co.*, 239 Ill. 326; 88 N. E. Rep. 192.

An agreement which "granted" an exclusive right to drill for oil and gas in a certain tract, and take them out for twenty years, was held to amount to a sale, conditioned in the first instance on the existence of oil or gas, but made absolute by the finding of either one. *In re Brunot's Estate*, 29 Pittsb. L. J.

(N. S.) 105. See *Gadbury v. Ohio, etc., Gas Co.*, 162 Ind. 9; 67 N. E. Rep. 259; 62 L. R. A. 895.

¹³ Alluding to the cases previously cited in the opinion.

¹⁴ *Huggins v. Daley*, 99 Fed. Rep. 606; 40 C. C. A. 12; 48 L. R. A. 320. Citing *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 593; *Guffy v. Inkill*, 34 W. Va. 49; 11 S. E. Rep. 754; 8 L. R. A. 759, and *Rorer Iron Co. v. Trout*, 83 Va. 397; 2 S. E. Rep. 713; *Conrad v. Moorehead*, 89 N. C. 31; *Maxwell v. Todd*, 112 N. C. 677; 16 S. E. 926; *Hawkins v.*

§ 57. When title to oil vests in lessee—Ejectment.

While the lessee or grantee of an oil or gas lease may exclude anyone else from the premises who seeks to extract oil or gas from them, yet he does not obtain title to the oil beneath the surface until he has reduced such oil or gas to his possession by extracting it from the land covered by the lease. "Oil and gas in the earth," said Justice Sanborn, "unlike ore and coal, is fugacious, and not susceptible of ownership distinct from the soil. A grant by lease or deed of the oil or gas in a specified

Pepper, 117 N. C. 407; 23 S. E. 489; *Gadbury v. Ohio, etc., Gas Co.*, 162 Ind. 9; 67 N. E. Rep. 259; 62 L. R. A. 895; *Lowther Oil Co. v. Miller-Sibley Oil Co.*, 53 W. Va. 501; 44 S. E. Rep. 433; 97 Am. St. 1027; *Monfort v. Lanyon Zinc Co.*, 67 Kan. 310; 72 Pac. Rep. 784; *Flanagan v. Marsh (Ky.)*, 105 S. W. Rep. 424; 32 Ky. L. Rep. 184; *Buffalo, etc., Co. v. Jones*, 75 Kan. 18; 88 Pac. Rep. 537; *Murray v. Barnhart*, 117 La. 1023; 42 So. 489; *Troxell v. Anderson Coal Mining Co.*, 213 Pa. 475; 62 Atl. Rep. 1083; *Brewster v. Lanyon Zinc Co.*, 140 Fed. Rep. 801; 72 C. C. A. 213; *Tennessee Oil, etc., Co. v. Brown*, 131 Fed. Rep. 696; 65 C. C. A. 524; *J. M. Guffey Petroleum Co. v. Jeff Chaison Townsite Co.*, 48 Tex. Civ. App. 555; 107 S. W. Rep. 609; *Mills v. Hartz*, 77 Kan. 218; 94 Pac. Rep. 142; *Pleasant v. Hanna*, 63 W. Va. 613; 60 S. E. Rep. 618; *Power v. Bridgeport*, 238 Ill. 397; 87 N. E. Rep. 381; *Gillespie v. Fulton Oil & Gas Co.*, 236 Ill. 188; 86 N. E. Rep. 219; *New American, etc., Co. v. Troyer*, 166 Ind. 402; 76 N. E. Rep. 253; 77 N. E. Rep. 739; 74 N. E. Rep. 37; *New American, etc., Co. v. Wolff*, 166 Ind. 704; 76 N. E. Rep. 255; 74 N. E. Rep. 41; *Boal v. Citizens' Nat. Gas Co.*, 23 Pa. Super Ct. 339; *Armitage v.*

Mt. Sterling Oil & Gas Co. (Ky.), 80 S. W. Rep. 177; 25 Ky. L. Rep. 2262; *Indiana Natural Gas & Oil Co. v. Granger*, 33 Ind. App. 559; 70 N. E. Rep. 395; *Stahl v. Illinois Oil Co.*, 45 Ind. App. 211; 90 N. E. Rep. 632; *Howerton v. Kansas Natural Gas Co.*, 81 Kan. 553; 106 Pac. Rep. 47; *Smith v. Root*, 66 W. Va. 633; 66 S. E. Rep. 1005.

Conditions precedent must be literally performed, and a court of chancery cannot vest an estate under an oil lease where such a condition has not been performed; *Paraffine Oil Co. v. Cruce, (Okl.)*, 162 Pac. 716; *Wellsville Oil Co. v. Miller*, 44 Okl. 493, 145 Pac. 344, even though the condition be void *Wellsville Oil Co. v. Miller, supra*.

A provision in a lease that the lessee's failure to perform any of the conditions for 30 days after notice to perform given by the lessor, should render the lease void on the lessor's election, is a condition subsequent on the happening of which the lease should become forfeited, and comes within the provision of a statute providing that a condition involving a forfeiture should be strictly interpreted against the party for whose benefit it is created. *Jameson v. Chansler-Canfield Midway Oil Co. (Col.)*, 167 Pac. 369.

tract of land and of the right to occupy and use so much of the surface of the land only as may be necessary to prospect for and remove the gas and oil is not a grant of the oil and gas in the land, but of such a part thereof only as the grantee finds and reduces to possession. It vests no title to any oil or gas which he does not extract and reduce to possession, and hence no title to any corporal right or interest. It therefore is insufficient to maintain ejectment by a grantee who has never taken possession of the land or prospected for or found any oil or gas under it."^{14a}

§ 58. Tenancy from year to year or at will.

A gas lease may be so drawn as to create a tenancy from year to year. Such an instance arose in Indiana. A statute of that State provided "that tenancy at will cannot arise or be created without an express contract, and all general tenancies, in which the premises are occupied by consent, either express or implied, of the landlord, shall be deemed tenancies from year to year."¹⁵ An oil and gas lease provided that it should begin the day it was executed, and terminate when gas ceased to be used generally for manufacturing purposes in a certain town, or on failure to pay or tender the rent agreed upon within sixty days after due. As a part of the consideration the lessee agreed to pay one hundred dollars per annum for each gas well drilled and producing gas in paying quantities—payments to begin and to become due as to each well on its completion, and to continue thereafter annually during the term of the lease. If the lessee failed to drill

^{14a} Priddy v. Thompson, 204 Fed. 955; 123 C. C. A. 277; Frank Oil Co. v. Bellevue Oil & Gas Co., 29 Okl. 719; 119 Pac. 260; 43 L. R. A. (N. S.) 487; Kolachny v. Galbreath, 26 Okl. 780; 110 Pac. 902; 38 L. R. A. (N. S.) 451; Kelly v. Harris (Okl.), 162 Pac. 219; Kelly v. Keys, 213 Pa. 295; 62 Atl. 911; 110 Am. St. Rep. 547; Dark v. Johnston, 55 Pa. 164; 93 Am. Dec. 732; Gillespie v. Fulton Oil & Groc. Co., 236 Ill. 188; 86 N. E. 219; Funk v. Holdeman, 53 Pa. 229; Hicks v. American Natural Gas Co.,

207 Pa. 570; 57 Atl. 55; 65 L. R. A. 209; Osborn v. Arkansas, etc., Gas Co., 103 Ark. 175; 146 S. W. 122.

Oil and gas lessees are not the owners of the oil and gas until reduced to possession, but only have the exclusive right to mine therefor. Campbell v. Smith, 180 Ind. 139; 101 N. E. 89; Strother v. Mangham, 138 La. 437, 70 So. Rep. 426; Fairbanks v. Warrum, 56 App. 337; 104 N. E. 983, 1141.

¹⁵ Burns' Rev. 1901, Sec. 7089.

a gas well, he was to pay fifty cents an acre; and if wells were not drilled within five years, then the rent was to be raised to one dollar an acre. If any other gas well was put down on the leased premises other than those stipulated for, then the lessee was to be released from the payment of the rent. As there was no definite time fixed for the running of the lease, it was held to be a tenancy from year to year, within the provision of the statute quoted; and hence was terminable at the end of any year.¹⁶ A sale of all the minerals under a tract of land, with the usual mining rights and privileges, giving a right to enter at any time with workmen and machinery, and mine and carry away coal; giving the right to use so much of the surface as might be necessary for the operations, to erect the necessary buildings, to construct roads, and to use water; the consideration to be a payment quarterly of 15 cents per ton for all iron ore so taken; with the privilege to remove the machinery and fixtures at any time, was held to create a tenancy at will.¹⁷ Where a

¹⁶ *Diamond Plate Glass Co. v. Eichelbarger*, 24 Ind. App. 124; 55 N. E. Rep. 233; *Diamond Plate Glass Co. v. Curless*, 22 Ind. App. 346; 52 N. E. Rep. 782; *Coalinga Pacific Oil & Gas Co. v. Associated Oil Co.*, 16 Cal. App. 361; 116 Pac. 1107.

A lease and a subsequent agreement binding the lessor to accept quarterly payment in lieu of drilling wells, was held not to create a tenancy at will in *Wilson v. Reserve Gas Co. (W. Va.)*, 88 S. E. 1075.

Several years afterwards the Supreme Court of the State in which those cases were decided, declined to accept this interpretation of such a lease; and under a statute that where there is a conflict between the decisions of the Appellate Court and of the Supreme Court, the latter shall prevail, those decisions just cited are no longer the law in Indiana. *Hancock v. Diamond Plate Glass Co.*, 162 Ind. 146; 70 N. E.

Rep. 149; *Hancock v. Diamond Plate Glass Co.*, 37 Ind. 351; 75 N. E. Rep. 659 (involves the law of the case); *Eichelbarger v. Diamond Plate Glass Co.*, 33 Ind. App. 699; 70 N. E. Rep. 1112; *Curless v. Diamond Plate Glass Co.*, 33 Ind. App. 699; 70 N. E. Rep. 1112; *Flores v. Diamond Plate Glass Co.*, 33 Ind. App. 700; 71 N. E. Rep. 1143. See, also, *Dickey v. Coffeyville, etc., Co.*, 69 Kan. 106; 76 Pac. Rep. 398.

The Supreme Court of Oklahoma has declined to follow the case of *Diamond Plate Glass Co. v. Curless*, *supra*; *Frank Oil Co. v. Belleview Gas & Oil Co.*, 29 Okl. 719; 119 Pac. 260; 43 L. R. A. (N. S.) 487; *Kelly v. Harris (Okl.)*, 162 Pac. 219. See also *Kolachny v. Galbreath*, 20 Okl. 780; 110 Pac. 902; 38 L. R. A. (N. S.) 451.

¹⁷ *Cowan v. Radford Iron Co.*, 83 Va. 547; 3 S. E. Rep. 120.

A lease demising the right to mine coal, together with the surface right, was held to give lessee only

lessee had the right to surrender the lease, after which all his liabilities under it should cease, it was held that this provision, taken in connection with the granting clause, which stated no time to run, and the *habendum* clause, giving the lessee two years in which to drill for oil, did not create an estate at will.¹⁸ A grant of oil privilege, without limitation as to time, in consideration of one dollar, contained this clause: "In case no well is completed within two years from this date, then this grant shall immediately become null and void as to both parties; provided, that the second party may prevent such forfeiture from year to year by paying to the first party annually in advance eighteen dollars, at her residence until such well is completed." It was held that by this clause the grant was converted into a lease from year to year, at the option of the lessee, until a well was completed; and that it would then continue so long as oil was produced in paying quantities.¹⁹

§ 59. Unilateral contract.

In Texas many of the so-called gas leases are regarded as

a lease hold interest, and not to convey to him any title to coal in situ. *State v. Roden Coal Co.* (Ala.), 73 So. 5.

A contract between a landowner and a corporation, giving the latter the exclusive right to bore for gas, and providing that the corporation should pay a certain sum annually until it had put down a gas well, but that the contract should be terminated whenever natural gas ceased to be used generally for manufacturing purposes, or whenever the corporation should fail to pay the annual rental within sixty days after it became due, did not create a tenancy at will, within Burns' *Indiana Rev. St.* 1901, Sec. 7089, providing that all general tenancies in which the premises are occupied by the consent, either express or constructive, of the landlord, shall

be deemed tenancies at will. *Hancock v. Diamond Plate Glass Co.*, 70 N. E. 149; 162 Ind. 146.

¹⁸ *Brown v. Fowler*, 65 Ohio St. 507; 63 N. E. Rep. 76; *Patton v. Axley*, 50 N. C. 440.

¹⁹ *Lowther Oil Co. v. Guffey*, 52 W. Va. 88; 43 S. E. Rep. 101; *Lowther Oil Co. v. Miller-Sibley Oil Co.*, 53 W. Va. 501; 44 S. E. Rep. 433; 97 Am. St. 1027.

Where the lessee was given the right to surrender a lease at the expiration of its term on payment of one dollar, but the lessor was not given the right to enforce a surrender, it was held that it did not create a tenancy at will, and hence did not render the lease invalid for lack of mutuality. *Poe v. Ulery*, 233 Ill. 56; 84 N. E. Rep. 46. See § 57, note 44.

unilateral contracts. Thus, when the consideration for a so-called lease was only one dollar and a promise to develop the premises and deliver to the lessee a stated per cent. of the oil produced; and it was stipulated that the lessee might terminate the lease at any time, and that the sum paid should be the lessor's full compensation, it was held that the contract was unilateral and void; that a sale of the premises before operations began terminated the lease, and that it was not a cloud on the title of such premises.²⁰

The same construction was put upon a contract which provided that operations should be begun and continued at the discretion of the lessee, and that no cessation of operations should operate as a forfeiture.^{20a}

But a contract granting the right to drill for minerals within a limited period of time, for an adequate consideration paid by the grantee was held not void, merely because the grantee was not obliged to do anything more.^{20b}

²⁰ *Roberts v. McFaddin*, 32 Tex. Civ. App. 47; 74 S. W. Rep. 105; *Natural Oil, etc., Co. v. Teel*, 95 Tex. 586; 67 S. W. Rep. 45; 68 S. W. Rep. 979; *Emery v. Ledequ*, 6 Tex. Civ. App. 719; 72 S. W. Rep. 602; *Hodges v. Brice*, 32 Tex. Civ. App. 358; 74 S. W. 590; *Witherspoon v. Staley* (Tex. Civ. App.), 138 S. W. 1191.

Where there is no obligation on the lessee under an oil lease, there is no consideration moving to the lessor, and therefore no contract. *Caddo Oil & Mining Co. v. Producers Oil Co.*, 134 La. 701, 54 So. 684.

A contract between an owner of oil lands and an oil company giving the company the right to bore for oil or to pay a quarterly rental, or to surrender the grant at any time upon the payment of \$5.00 to the owner, was held to be a unilateral contract and void for want of mu-

tuality; the \$5.00 being merely a nominal consideration. *Owens v. Corsicana Petroleum Co.* (Tex. Civ. App.), 169 S. W. 192.

A conveyance and lease of all the oil and gas in and under certain land for one year and as much longer as oil or gas is found in paying quantities, for which lessees pay \$1 an acre and agree to deliver to the lessor one-eighth of the oil or gas found and to begin operations for drilling a well within six months, or to pay 50 cents per acre in advance for one six months' extension of the time for beginning operations, is not void as being unilateral. *Pierce Fordyce Oil Ass'n. v. Woodrum*, 188 S. W. Rep. 246.

^{20a} *Collins v. Abel*, 151 Ala. 207; 44 So. 109.

^{20b} *Cochran v. Gulf Refining Co.*, 139 La. 1010; 72 So. Rep. 718.

§ 60. Legal interest of lessee in various leases—Digest.

Under various heads we have discussed the interest a licensee, lessee or grantee under a written instrument has in the premises described in the instrument giving oil or gas mining privileges. It is safe to say that all the cases cannot be reconciled with respect to the interest the operator has in the premises, and nothing more can be done than to enumerate each particular case, or a number of them; for it will be impractical to examine and state the result of all of them. Cases, however, with respect to licenses will be omitted here, for they have been treated elsewhere. To begin the enumeration. An agreement to lease land for a term of years, giving the exclusive right to bore for and collect all the oil passes a corporeal interest in the land.²¹ A guardian, while he may usually give a lease of his ward's property, cannot give a lease for the purpose of developing the oil in it; for the reason that it is a part of the realty, and such a lease is a part of the estate of the ward.²² A lease only for the purpose of drilling for oil, coal, rock or petroleum given to the lessee, his heirs and assigns, for twenty-five years, in consideration of one-half the oil found, vests in the lessee a corporeal interest in the business, which is the subject of ejectment.²³ A grant to C, his heirs and assigns, of the free and uninterrupted right to go upon a tract of land to prospect, bore and take ore, oil and gas out of the earth, the grantor to receive one-third of all taken out, and reserving the right of tillage, vests in C an incorporeal hereditament in fee.²⁴ A grant of all the iron ores upon and under a tract of land, with the exclusive and full right to mine them, is a conveyance of an incorporeal hereditament passing in fee simple the entire ownership of the ore in the land.²⁵ An exclusive possession of such of the land as

²¹ *Chicago, etc., Co. v. United States Co.*, 57 Pa. St. 83; *Duke v. Hague*, 107 Pa. St. 66.

²² *Stoughton's Appeal*, 88 Pa. St. 198; *Chamberlain v. Dow*, 16 W. N. C. 532; *South Penn. Oil Co. v. McIntire*, 44 W. Va. 296; 28 S. E. Rep. 922; *Haskell v. Sutton*, 53 W. Va. 206; 44 S. E. 533.

²³ *Barker v. Dale*, 3 Pitts. L. J. 190.

²⁴ *Funk v. Haldeman*, 53 Pa. St. 229; *Union Petroleum Co. v. Bliven, etc., Co.*, 72 Pa. St. 173.

²⁵ *Grove v. Hodges*, 55 Pa. St. 504; *Caldwell v. Fulton*, 31 Pa. St. 475; *Kolachny v. Galbreath*, 20 Okl. 772; 110 Pac. 902; 38 L. R. A. (N. S.) 451.

is necessary, given for the purpose of searching for, producing, storing and transporting oil, is not a mere license.²⁶ A grant of the "exclusive right and privilege of digging and boring for oil and other minerals," for a term of years is a lease for the production of oil and not a sale of the oil.²⁷ A lease for a term of years, with right to bore for oil and take it, rendering a part to the owner of the land, confers an estate in the nature of an incorporeal hereditament.²⁸ An instrument giving B the right to enter on certain lands and prospect for coal, and if found in sufficient quantities to satisfy him, giving him the privilege to mine and remove it, paying a certain amount per ton, and also giving him the right, at his pleasure, to abandon the agreement, creates only an estate at will.²⁹ An instrument granting and conveying the right to enter on certain lands and take the minerals thereon forever, unless none should be found within a certain named period, is a grant in fee, though called a "lease."³⁰ A right given in the following language is a lease: "The said party, of the first part, for and in consideration of the rents and covenants hereinafter mentioned, to be paid and performed on the part of the said party of the second part, the right to mine and take away coal from the Salem vein," etc. "A right to use a mine necessarily implies a right to possess it; and a grant of the use and possession, in consideration of something to be rendered, is exactly what constitutes a lease of the thing to be possessed."³¹ A grant of land for an indefinite period, with

²⁶ *Kitchen v. Smith*, 101 Pa. St. 452.

²⁷ *Duffield v. Hue*, 129 Pa. St. 94; 18 Atl. Rep. 566; *Barnhart v. Lockwood*, 152 Pa. St. 82; 25 Atl. Rep. 879. See *Wettengel v. Gormley*, 160 Pa. St. 559; 28 Atl. Rep. 934.

²⁸ *Ohio Oil Co. v. Toledo, etc., Co.*, 4 Ohio C. Ct. Rep. 210; 2 Ohio Cir. Dec. 505.

In *Herrington v. Wood*, 6 Ohio C. Ct. Rep. 326, 3 Ohio Cir. Dec. 475, the usual oil lease was called a

license coupled with a conditional grant.

A judgment rendered against a licensee operating an oil well is not a lien on such well. *Meridian National Bank v. McConica*, 8 Ohio C. Ct. Rep. 442; 4 Ohio Cir. Dec. 106.

²⁹ *Knight v. Indiana, etc., Co.*, 47 Ind. 105.

³⁰ *Suffern v. Butler*, 21 N. J. Eq. 410; affirming 4 C. E. Green Ch. (N. J.) 202.

³¹ *Offerman v. Starr*, 2 Pa. St. 394.

leave to take, under specified conditions, all the coal contained in the land, with a provision for a forfeiture on non-compliance by the grantee, is a lease.³² A lease of land in Kansas by a married man, who is the owner, occupying the same with his family as a homestead, giving to the lessee the right to prospect for coal, gas, oil and other minerals at his pleasure, to erect necessary buildings, and to excavate mines and pipe oil and gas, is such an alienation of the homestead as requires the wife's consent, under the constitution of that State.³³ A contract to raise not less than so much ore a year from mines on certain land, for which the contractor is to receive so much per ton, to have tools furnished, and the use of the land and buildings, is a lease.³⁴ An agreement letting lands to be examined for minerals and taking them out at a royalty payable quarterly, the right to continue so long as the grantee deems it advisable to operate, and to be forfeited on cessure of one year to operate, is a lease from year to year.³⁵ A parol agreement that a person may enter on the land of another, dig ore and erect buildings, for a consideration, has been held to be a lease.³⁶ An instrument giving exclusive possession of land for the purpose of searching for, producing, storing and transporting oil, is a lease, establishes the relation of landlord and tenant, and enables the tenant or lessee to recover from the landlord or lessor taxes he has paid under a statute allowing a tenant to recover the amount of taxes he has paid on the leased premises.³⁷ A lease of land "of the exclusive right for the sole and only purpose of mining and excavating for petroleum, rock and carbon oil," "to hold the said premises exclusively for the said purposes only," for a term of years, the lessor reserving the privilege to till the land and remove the timber on it and the use of all other land not necessary for producing oil, and also reserving certain

³² *Gartside v. Outley*, 58 Ill. 210.

³³ *Franklin Co. v. Coal Co.*, 43 Kan. 518; 23 Pac. Rep. 630. See, also, *Monfort v. Lanyon Zinc Co.* 67 Kan. 310; 72 Pac. Rep. 784; *Ralston v. Wichita Natural Gas Co.*, 81 Kan. 86; 105 Pac. Rep. 430; *Homestead in Oklahoma Bay v. Oklahoma, etc., Co.*, 13 Okl. 425; 73 Pac. Rep. 936. In Illinois, *Gillespie v. Fulton Oil & Gas Co.*, 236 Ill. 188; 86 N. E. Rep. 219; *Poe v. Ulrev*, 233 Ill. 56;

Oil & Gas Co., 140 Ill. App. 147; *Bruner v. Hicks*, 230 Ill. 536; 82 N. E. Rep. 888.

³⁴ *Shaw v. Wallace*, 25 N. J. L. 453.

³⁵ *Patton v. Axley*, 5 Jones L. (N. C.) 440.

³⁶ *Sheets v. Allen*, 89 Pa. St. 47; *Moore v. Miller*, 8 Pa. St. 272, 283. See *Ganter v. Atkinson*, 35 Wis. 48.

³⁷ *Kitchen v. Smith*, 101 Pa. St. 452.

royalties, is a lease in fact and not a license.³⁸ An instrument containing the words "hath granted and leased, and by these presents do grant, lease, and to farm let," and convey "the exclusive right to enter upon all the lands" of the so-called lessor, "and dig and mine upon the same for phosphate rock and other minerals to any extent he may require, and carry away and sell the same for his own use," is a lease operating as a conveyance of the minerals in place, and not a mere license to dig.³⁹ An instrument containing the words "does demise and lease" for mining purposes only, the grantee having the right to erect all necessary buildings and machinery, and being required to provide and keep closed gates through which to enter and pass off the land, giving him possession for ten years, at a fixed rent, is a lease and not a license.⁴⁰ A contract conveying certain land for a term of years, and so long as gas and oil be found in paying quantities, is a lease coupled with a conditional grant, dependent on the production of gas or oil in paying quantities.⁴¹ A contract allowing a person to go to a particular part of the owner's land, giving him exclusive right to the minerals thereon so long as he complies with the terms and conditions of his contract, on payment of a royalty on all minerals mined, is a lease, although it has no determinate period.⁴² A grant of a right to work a stone quarry creates the relation of landlord and tenant.⁴³ An agreement "for the purpose of exploring for, mining, taking out, and removing therefrom the merchantable shipping iron ore which is or which hereafter may be found in, or under" cer-

³⁸ *Duke v. Hague*, 107 Pa. St. 57; *Brown v. Beecher*, 120 Pa. St. 590; 15 Atl. Rep. 608; *Wettengel v. Gormley*, 160 Pa. St. 559; 28 Atl. Rep. 934; *Gale v. Petroleum Co.*, 6 W. Va. 200.

³⁹ *Malcomson v. Wappoo Mills*, 85 Fed. Rep. 907.

⁴⁰ *Kirk v. Mattier*, 140 Mo. 23; 41 S. W. Rep. 252; *Consolidated Coal Co. v. Peers*, 150 Ill. 344; 37 N. E. Rep. 937, affirming 39 Ill. App. 453.

⁴¹ *Herrington v. Wood*, 6 Ohio Cir. Ct. Rep. 326; 3 Ohio Cir. C. Dec. 475.

⁴² *Buenanan v. Cole*, 57 Mo. App. 11; *Springfield, etc., Co. v. Cole*, 130 Mo. 1; *Young v. Ellis*, 91 Va. 297; 21 S. E. Rep. 480.

⁴³ *O'Donnell v. Luskin*, 12 Mont. Co. L. Rep. (Pa.) 109.

As to the right of the lessee to maintain ejectment, see *Kirk v. Mattier*, 140 Mo. 23; 41 S. W. Rep. 252.

In New York oil leases and wells held by virtue of them are made personal property by statute. *Wagner v. Mallory*, 169 N. Y. 501; 62 N. E. Rep. 584, affirming 58 N. Y. Supp. 526.

tain land, and which reserves the use and possession of the land, except as such use and possession may interfere with the mining operations, is a lease for mining ore, and ceases when it is demonstrated there is no iron ore on the premises.⁴⁴

§ 61. Digest of cases continued.

Since the first edition of this work was published, many cases concerning oil and gas leases have been decided. Following the plan pursued in the preceding section, we here give a digest of some of the more important ones. Thus, an instrument was executed wherein the owner of land, which was therein described rented to another all the oil and gas under such land, giving him the exclusive right to enter thereon at all times in order to drill and operate for oil and gas. It provided for the time within which the several wells should be completed, with a stipulated monthly rental for each well not finished on time; and that each location should consist of ten acres more or less, no well to occupy more than one acre. Of this instrument it was said that it was not a lease as leases are usually understood, but a mere grant of an exclusive right to enter and explore for gas and oil, and to prosecute such business, occupying no more land than was needed for that purpose, not more than one acre to a well.^{44a} Until oil and gas is actually produced and served under the lease, the legal title to it and possession of it, remain in the owner of the land to which it is confined.^{44b}

A land owner entered into a contract with a corporation by the terms of which the latter was to have the exclusive right to bore for natural gas on the former's lands, and was to pay a certain sum annually until it had put down a gas well; and it was stipulated that the contract should be terminated whenever natural gas seemed to be used generally for manufacturing purposes or "whenever the second party [the corporation]. or their assigns, shall fail to pay or tender the rental price, herein agreed upon, within sixty days of the date of its becoming due." It was held that the contract did not create

⁴⁴ *Gibben v. Atkinson*, 64 Mich. 651; 31 N. W. Rep. 570.

^{44a} *Stahl v. Illinois Oil Co.*, 45 Ind App. 211; 90 N. E. 632.

^{44b} *Kansas Natural Gas Co. v. Board*, 75 Kan. 335; 89 Pac. Rep. 750; *Poe v. Ulery*, 233 Ill. 56; 82 N. E. Rep. 46; affirming 134 Ill. App. 298.

a tenancy from year to year, and that the failure on the part of the corporation to pay the annual "rental price" did not terminate the contract, but merely gave the land owner the right to do so.^{44c} A clause in an oil lease gave the lessee the option to surrender it before the expiration of the time, upon the payment of one dollar; but it did not give the lessor the power to compel a surrender. It was held not to create a tenancy at will, and hence did not render the lease invalid for lack of mutuality.^{44d} The obligation of a lessor is indivisible among his heirs when the consideration of the lease is the completion of one well for the exploration of the land for gas and oil.^{44e} In an oil and gas lease, the covenants of the lessee were introduced with a statement that the grant is on the following terms, followed by a stipulation that the lessee's failure to comply with any of them should render the lease void. It was held that the stipulation had reference to the legal effect of what preceded, and if that, by necessary implication, contained a covenant by the lessee to exercise reasonable diligence in prosecuting the development, such covenant is also a condition, a substantial breach of which would entitle the lessor to avoid the lease.^{44f}

A lease gave to a lessee the right for two years to operate for oil and gas on certain described land, with a provision, if no oil or gas were found, for the payment of rent of a certain amount, and that, if no oil or gas well be drilled by a certain date, all rights under the contract should cease at the option of the lessor, unless the lessee should pay a certain sum, entitling him to an extension of thirty days, the lessee having the right at any time after two years to terminate the lease on failure to find gas or oil, and that on failure of the lessee to comply with any of the agreements in the lease it should become void. It was held that the lessee had the right to enter on the land for the purpose of exploration, and to operate if oil and gas were discovered, but that no estate vested in him until such discovery.^{44g}

^{44c} *Hancock v. Diamond Plate Glass Co.*, 162 Ind. 146; 70 N. E. Rep. 149; *Hancock v. Diamond Plate Glass Co.*, 37 Ind. App. 351; 75 N. E. Rep. 659.

^{44d} *Poe v. Ulery*, 233 Ill. 56; 84 N. E. Rep. 46; affirming 134 Ill. App. 298.

^{44e} *Murray v. Barnhart*, 117 La. 1023; 42 S. B. Rep. 489.

^{44f} *Brewster v. Lanyon Zinc Co.*, 140 Fed. Rep. 801; 72 C. C. A. 213.

^{44g} *Rawlings v. Armel*, 70 Kan. 777; 79 Pac. Rep. 683.

An instrument granted all the coal, gas and oil under a certain described tract of land. It was denominated a lease for a definite term of fifteen years, and provided, in addition to a cash payment of fifty dollars, for the payment of a royalty on all oil produced. It was held that it did not convey the fee of the mineral in place, but was merely a lease.^{44h} A land owner, in consideration of a sum in hand paid, and a further sum to be paid, leased the right and privilege of prospecting, examining, and searching" for coal, oil, or other minerals, and "the right and privilege to dig, excavate, and bore" for them, if found, and to remove them, with the use of as much wood and coal as might be required to operate the machinery in the oil wells. Oil had been discovered in the vicinity, and there had been at least two wells put down on the premises, and the existence of coal was well known. Oil was produced in paying quantities from some of the wells dug, and the additional compensation was paid, and the operations were continued for several years. Fifteen years thereafter the premises were abandoned. No mines were opened for coal and no use was made of the premises by the parties nor their successors, except for the purpose of prospecting and pumping oil, and the premises were subsequently conveyed "subject to such restrictions and leases as are now held upon said premises." It was held that, interpreting the instrument in the light of the then existing conditions, it was a lease for oil, gas, and salt purposes, and not a deed conveying, in fee simple, the minerals under the land.⁴⁴ⁱ

Where a person, under a lease conveying to him all the gas and oil under a certain described real estate, entered upon the land and caused to be drilled three gas wells, and paid the lessor, under the agreement, \$300 per annum rental therefor, it was held that he thereby acquired a vested interest in the land for the purpose named in the lease. "Through the in-

^{44h} "Applying to this instrument the ordinary rules of construction, and considering all its parts with a view to harmonizing them and arriving at the real intention of the parties, it is, in my opinion, simply a lease, the \$50 mentioned being a bonus paid or agreed to be paid to

induce its execution." *Moore v. Sawyer*, 167 Fed. Rep. 826, distinguishing *Brewster v. Lanyon Zinc Co.*, 140 Fed. Rep. 801; 72 C. C. A. 213.

⁴⁴ⁱ *McMillin v. Titus*, 222 Pa. 500; 72 Atl. Rep. 240.

strument and entry, and the production of gas thereunder, appellee acquired a vested interest in the land for the purpose named in the lease."^{44j} Where a lease gave the lessee the right to prospect for gas and oil, in consideration of a certain part of the oil, if produced on the premises in paying quantities, and, if gas only were found, an annual rental for each well while operated, it was held that it vested no estate in the land prior to discovery; but conferred merely the right of exploration, the title remaining inchoate and contingent on the finding of oil or gas in paying quantities.^{44k} A provision in a gas lease that if wells are put in operation, and at any time the lessee is satisfied that it is not paying, he shall surrender the lease and remove the machinery, was held not to make the lessee a tenant at will, and the lease was not terminable at his option, after the production of gas, on his assertion that a well was unprofitable, when the contrary was true.^{44l}

By a lease land owners granted a lessee the exclusive right to enter on the premises, to bore wells, mine, or to do whatever might be necessary and proper for the development and extraction of petroleum, etc., with the privilege of conveying over the land any of such substances produced therefrom and of maintaining on the premises structures necessary for the objects of the lease, to hold the premises and privileges with the appurtenances for the enumerated purposes for twenty years unless terminated for failure to comply with the terms of the lease, the lessee to have the right to abandon the lease at any time that it deemed it unprofitable to hold or operate, and, if oil were found the lessee to pay the lessor a royalty of one-tenth part of that produced. It was held that the contract vested no present title in the lessee to a stratum of the land in place, but left the title to the oil in the land owner until it was brought to the surface, vesting in the lessee an estate for years so far as necessary for the purpose of taking oil therefrom, carrying with it the right to extract the oil and remove it from the premises, which constituted for the term prescribed

^{44j} Carr v. Huntington L. & F. Co., 33 Ind. App. 1; 70 N. E. Rep. 552.

^{44k} Richland Oil Co. v. Morriss, 108 Va. 288; 61 S. E. Rep. 762.

^{44l} Dickey v. Coffeyville, etc., Co., 68 Kan. 106; 76 Pac. Rep. 398.

^{44m} Graciosa Oil Co. v. Santa Barbara County, 155 Cal. 140; 99 Pac. Rep. 483; 20 L. R. A. (N. S.) 211.

a servitude on the land under the express provisions of Civ. Code, and a chattel real at common law.^{44m}

A deed granting, by use of appropriate technical terms, all the oil and gas under a tract of land, together with the exclusive right to enter thereon at all times for the purposes of drilling and operating for oil and gas, but limiting the estate to a term of seven years and as much longer as oil or gas may be found thereon in paying quantities, stipulating for the payment of commutation money for delay in drilling denominating it rental, and providing for one-eighth of all the oil produced and saved from the premises and also for payment of a yearly rental for every gas well from which gas is transported and used off of the premises, does not pass the title to the oil and gas in place, but is, in legal effect, a mining lease, and the title to the oil and gas in place remains in the grantor.⁴⁴ⁿ

In a contract between the owner of land and an oil operator it was provided that the owner thereby granted to the operator all rights, title, and interest to the gas and oil under the land, with the right to enter to drill for gas and oil and operate the wells, and required him to drill a well within a certain time. It was held that the contract was not a conveyance of the oil under the ground, but merely authorized him to explore the land and acquire title to the oil upon extracting it from the ground, which right was the subject of contract.^{44o}

An oil and gas lease gave the lessee the right for ten years to explore for oil and gas, and provided that if a well be not completed on the premises within three months from the date of the lease the lessee should pay to the lessor, in advance, a quarterly cash rental for each additional three months' delay. It was held that the so-called lease was only an executory contract which vested no title in the lessee to the oil and gas in place.^{44p}

⁴⁴ⁿ Toothman v. Courtney, 62 W. Va. 167; 58 S. E. Rep. 915; Gillespie v. Fulton Oil & Gas Co., 239 Ill. 326; 88 N. E. Rep. 192; Headley v. Hoopengartner, 60 W. Va. 26; 55 S. E. Rep. 744.

^{44o} O'Neil v. Sun Co. (Tex. Civ. App.), 123 S. W. Rep. 172.

^{44p} Smith v. Root, 66 W. Va. 633; 66 S. E. Rep. 1005; 30 L. R. A. (N. S.) 176.

A grant to a corporation and its assigns of all gas and oil in and under a tract of land, on consideration that the grantee should drill a well within six months, or thereafter pay a certain annual sum, or reconvey the property to the grantor, and that the grantee might, at any time, remove its property and reconvey the premises, thereupon the contract in the grant should be void, after six months, and until a well was drilled, was held to be a lease at an annual rental, at the option of the lessee only.⁴⁴⁰ A husband and wife leased to a corporation certain land, with the privilege of entering thereon for ten years and boring gas and oil wells and conveyed the title to any such products for a specified royalty; and the corporation agreed to complete a well within two years, or pay a fixed rental. The contract provided that the term might be extended indefinitely on discovery of gas or oil, and that the corporation could surrender the contract at any time. It was held that the instrument was not a lease of the premises, but a sale to the corporation of an option to exercise the privilege granted as it might choose.⁴⁴¹ Where a lease provided that the lessee should explore the lands for gas and oil within a certain time, or pay a certain sum quarterly in case of delay, it was held that the lessee had no right to secure possession until default by the lessee, both in not exploring the land and not paying for the delay.⁴⁴² A lease for ten years and as much longer as gas and oil should be found in paying quantities, a royalty to be paid on the oil and so much per annum for each gas well, requiring a well to be drilled within three months from its date or a certain rental to be paid per annum in advance, giving the lessee and his heirs and assigns the right to surrender it at any time on notice to the lessor of an intent to do so, but providing that on giving such notice the lease should be void, is a mere option without valuable considera-

⁴⁴⁰ Central Ohio Nat. Gas & Fuel Co. v. Eckert, 70 Ohio 127; 71 N. E. Rep. 281; Oil Co. v. Crawford, 55 Ohio St. 161; 44 N. E. Rep. 1093; 34 L. R. A. 62; Lowther Oil Co. v. Guffey, 52 W. Va. 88; 43 N. E. Rep. 101; Warner v. Cochrane, 128 Fed. Rep. 553; 63 C. C. A. 207.

⁴⁴¹ Pittsburg, etc., Co. v. Bailey, 76 Kan. 42; 90 Pac. Rep. 803; Ringle v. Quigg, 74 Kan. 581; 87 Pac. Rep. 724.

⁴⁴² Houssierre-Latreille Oil Co. v. Jennings-Heywood Oil Syndicate, 115 La. 107; 38 So. Rep. 932. See Martel v. Jennings-Heywood Oil Syndicate, 114 La. 351; 38 So. Rep. 253.

tion, constituting only an estate at will in the lessee, and determinable at the will of the lessor, without cause.^{44t}

^{44t} Lovett v. Eastern Oil Co., 68 W. Va. 667; 70 S. E. 707.

Certain acts held to constitute a breach of a covenant in an oil lease. Millan v. Bartlett, 69 W. Va. 155; 71 S. E. 13.

Contract for digging an oil and gas well, held not to create the relation of landlord and tenant, but a mere option which expired on the defendant's failure to begin a well or to pay rent. Risch v. Burch, 175 Ind. 621; 95 N. E. 123.

Contract continued and held not to contain a positive condition; and that a purchaser of the land was bound by a duly recorded lease thereon. Busch-Everett Co. v. Vivian Oil Co., 128 La. 886; 55 So. 564.

An instrument held to create the relation of landlord and tenant. Coalinga Pacific Oil & Gas Co. v. Associated Oil Co., 16 Cal. App. 361; 116 Pac. 1107.

An oil and gas lease is a grant of that part of the oil and gas which the grantee may find and capture, but no title vests until the oil or gas is reduced to possession, and hence the lease is a grant of an incorporeal hereditament. Priddy v. Thompson, 204 Fed. 955; 123 C. C. A. 277.

An oil lease of premises for five years, and as much longer as oil is found in paying quantities conveys a freehold estate, since it may continue indefinitely. Daughtee v. Ohio Oil Co., 263 Ill. 518; 105 N. E. 308; affirming 181 Ill. App. 135.

An instrument whereby the lessor grants, sells, conveys, and leases unto the lessees all the oil and gas in and under certain land for one year and as much longer as oil or gas is found in paying quantities,

for which the lessees agree to deliver one-eighth part to the lessor and to begin operations for drilling of a well within six months, or to pay 50 cents per acre in advance for one six months' extension of the time for beginning operations, providing that all covenants between the parties shall extend to their assigns, is governed by the law relating to leases, and assignees of the lessees are liable to the lessor, where the operations for digging wells are not commenced within six months, for the 50 cents per acre. Pierce Fordyce Oil Ass'n v. Woodrum, 188 S. W. Rep. 245.

Under the Oklahoma statutes an oil lease is an interest relating to real estate, though not arising to the dignity of an estate prior to the entry by the lessee; it is property. The lessee has a vested interest to enter and explore; and he may sell and transfer his lease. Shaffer v. Marks, 241 Fed. 139. As to Louisiana, see Nabors v. Producing Oil Co., 140 La. 985; 74 So. 527; 39 L. R. A. 249; 66 Am. St. 740.

A lease given in consideration, paid the lessor and the covenant and agreements therein set forth, containing the usual words of grant and devise, running to the lessee, his heirs and assigns, describing the purpose for which it is given as that of mining and operating oil and gas wells and laying pipe lines and building tanks and other structures to take care of those substances when produced on the premises, defining the terms for which it is given to endure as five years from its date "and as long thereafter as oil or gas or either of them is

§ 62. Sale of oil and gas, and not a lease.

An instrument may be so drawn as to convey an interest in the solid minerals beneath its surface, with the right to mine them. Such an instrument is not to be strictly construed as conveying an interest in the land. Thus where a so-called lease of lands provided that the lessee (so called) should have all the coal beneath the surface for a long term of years, the lessee to take out a minimum number of tons each year until all the available coal was removed, and pay so much a ton, the minimum amount to be paid for whether mined or not, it was held that this was an absolute sale of the coal, conditioned, of course,

produced" from the premises, where-in the lessee agrees to deliver to the lessor, free of cost, in the pipe line to which the well may be connected the equal one-eighth part of all oils produced and saved from the premises, to pay \$100 per year for the gas from each gas well, the product of which is marketed and used off the premises, to locate all wells so as to interfere as little as possible with the cultivated portions of the land, and to complete a well on the premises within nine months' after the date of the lease, or pay at the rate of 25 cents per acre per year, quarterly in advance, for the additional time the completion of a well is delayed beyond the nine months, either directly to the owner or deposited in a designated bank; and which contains a surrender clause to the effect that "upon the payment of \$1, at any time," the lessee, his heirs or assigns, "shall have the right to surrender" the lease "for cancellation, after which all payments and liabilities thereafter to accrue" thereunder "shall cease and determine," passes to the lessee in Illinois, his heirs and assigns, a present vested right—"or freehold interest"—in the premises, which is taxable as

real property, the clause giving a right to surrender being valid, and does not create a tenancy at will or give the lessor an option to compel a surrender, and does not make the lease void as wanting in mutuality. *Guffey v. Smith*, 237 U. S. 101, 35 Sup. Ct. 526; 59 L. Ed. 855; reversing 202 Fed. 106, 120 C. C. A. 436; citing *Bruner v. Hicks*, 230 Ill. 536, 82 N. E. 888; *Watford Oil & Gas Co. v. Shipman*, 233 Ill. 9; 84 N. E. 53; 122 Am. St. 144; *Poe v. Ulley*, 233 Ill. 56; 84 N. E. 46; *Ulrey v. Keith*, 237 Ill. 284; 86 N. E. 696; *People v. Bell*, 237 Ill. 332; 86 N. E. 593; *Daughtee v. Ohio Oil Co.*, 263 Ill. 518; 105 N. E. 308.

An agreement for the use of and occupation of land in consideration of a portion of the product of oil developed therefrom is a lease, irrespective of its form or the designation given it by the parties. *Cummins v. Guaranty Oil Co.* (Cal. App.), 154 Pac. 882.

A mineral lease partaking of the nature of a lease as well as of a sale, and not appearing to have been provided for by statute, will be deemed a lease, and the laws relative to ordinary leases applied thereto as far as possible. *Spence v. Lucas*, 138 La. 763, 70 So. 796.

upon its being removed, and not a lease of the premises for mining purposes.⁴⁵ Similar decisions have been made with reference to oil and gas, the royalty representing the purchase money.⁴⁶ Thus, a contract to drill and operate gas and oil wells for a royalty for the gas or oils produced with time limit within which wells are to be completed and extensions of the term granted in case profitable wells are developed and upon failure to complete wells within stipulated periods, subject to rental at a stipulated sum per acre or forfeiture of lease of lands for the term, is not a lease, but is a sale of petroleum products.^{46a} So an oil lease for five years, and as much longer as oil is found in paying quantities, conveys a freehold estate, for it may continue indefinitely.^{46b}

§ 63. Presumption as to ownership of oil or gas in ground.

The presumption is that the owner of the land owns the gas and oil beneath the surface; but this is a presumption that may

⁴⁵ *In re Lazarus Est.*, 145 Pa. St. 1; 23 Atl. Rep. 372; *Hope's Appeal*, 3 Atl. Rep. 23; *In re Hancock's Est.*, 7 Kulp. (Pa.), 36; *Hobart v. Murray*, 54 Mo. App. 249; *Lehigh Coal Co. v. Wright*, 7 Kulp (Pa.), 434; 15 Pa. Co. Ct. Rep. 433. (*Contra* *Austin v. Huntsville Coal, etc., Co.*, 72 Mo. 535.) *Reynolds v. Hanna*, 55 Fed. Rep. 783; *Adams v. Ore Knob, etc., Co.*, 7 Fed. Rep. 634; *Williams v. Gibson*, 84 Ala. 228; 4 So. Rep. 350; *Manning v. Frazier*, 96 Ill. 279; *Consolidated Coal Co. v. Peers*, 150 Ill. 344; 37 N. E. Rep. 937; *Chester Emery Co. v. Lucas*, 112 Mass. 424; *Delaware, etc., Co. v. Sanderson*, 109 Pa. St. 583; *Lilli-bridge v. Lackawanna Coal Co.*, 143 Pa. St. 293; 22 Atl. Rep. 1035; *Woodside v. Cicconi*, 93 Fed. Rep. 1; 35 C. C. A. 177; *Hosack v. Crill*, 204 Pa. 97; 53 Atl. Rep. 640. See *Rowell v. Bodfish (Me.)*, 10 Atl. Rep. 448; *Fairechild v. Dunbar*, 128 Pa. St. 485; 18 Atl. Rep. 443.

⁴⁶ *In re Dunat's Est.*, 29 Pittsb. L. J. 105; *Wilson v. Youst*, 43 W. Va. 826; 28 S. E. Rep. 781; 39 L. R. A. 292; *Detlor v. Holland*, 57 Ohio St. 492; 49 N. E. Rep. 690; 40 L. R. A. 266; *Kerlin, etc., Co. v. Toledo*, 20 Ohio C. C. Rep. 603; 8 Ohio N. P. 62; *Lawson v. Kirchener*, 50 W. Va. 344; 40 S. E. Rep. 344; *Hosack v. Crill*, 204 Pa. 97; 53 Atl. Rep. 641; *Blakeley v. Marshall*, 174 Pa. 425; 34 Atl. 564.

^{46a} *Miller v. Vandergrift*, 30 Ohio Cir. Ct. Rep. 730.

^{46b} *Daughtee v. Ohio Oil Co.*, 263 Ill. 518; 105 N. E. 308; affirming 181 Ill. App. 135.

A lease and demise of land for a fixed term, with a right to develop the land for oil or gas gives an interest in the land. *Chandler v. Hart*, 161 Cal. 405; 119 Pac. 516; *Osborn v. Arkansas, etc., Gas Co.*, 103 Ark. 175; 146 S. W. 122.

be rebutted, by showing that either the present owner or a former one had conveyed such oil and gas to another.⁴⁷

§ 64. Administrator's right to lease or contract—Presumption.

The right of an administrator of the lessee to lease or contract for searching for oil or gas and the operation of the premises, will depend upon whether the estate granted is an estate of inheritance or merely personal property. In the case of solid minerals the minerals may be conveyed separate and apart from the soil in which they rest; and when so conveyed they constitute a separate and distinct estate, vested in the grantee, while the grantor retains the fee of the land, except that of the minerals. The presumption is that the minerals belong to the owner of the land, but that "may be rebutted by evidence, showing a severance of the mines, and a distinct estate and interest in them by grant or reservation."⁴⁸ Minerals so conveyed constitute an inheritance separate and distinct from the surface;⁴⁹ and pass to the heirs and not to the

⁴⁷ *Adams v. Briggs Iron Co.*, 7 Cush. 361; *Grove v. Hodges*, 55 Pa. St. 504 (cases concerning coal and iron ore).

⁴⁸ *Adams v. Briggs Iron Co.*, 7 Cush. 361; *Kincaid v. McGowan*, 88 Ky. 91; 4 S. W. Rep. 802; *Chester Emery Co. v. Lucas*, 112 Mass. 424; *Hobart v. Murray*, 54 Mo. App. 249.

⁴⁹ *Wardell v. Watson*, 93 Mo. 107; 5 S. W. Rep. 605; *Hartwell v. Camman*, 2 Stock Eq. (N. J.) 128; *Suffern v. Butler*, 4 C. E. Gr. Ch. (N. J.) 202; affirmed 21 N. J. Eq. 410; *Canfield v. Ford*, 28 Barb. 336; *Marvin v. Brewster, etc., Co.*, 55 N. Y. 538; *Lacustrine, etc., Co. v. Lake Guano, etc., Co.*, 82 N. Y. 476; *First National Bank v. Dow*, 41 Hun 13; *Edwards v. McClurg*, 39 Ohio St. 41; *Newark Coal Co. v. Upson*, 40 Ohio St. 17; *Logan v. Washington Co.*, 29 Pa. St. 373; *Caldwell v. Fulton*, 31 Pa. St. 475; *Harlan v.*

Lehigh, etc., Co., 35 Pa. St. 287; *Caldwell v. Copeland*, 37 Pa. St. 427; 78 Am. Dec. 436; *Brown v. Corey*, 43 Pa. St. 495; *Pennsylvania Salt Co. v. Neel*, 54 Pa. St. 9; *Briggs v. Davis*, 81½ Pa. St. 470; *Sanderson v. Scranton*, 105 Pa. St. 469; *Hope's Appeal*, 29 W. N. C. (Pa.) 365; *Montooth v. Gamble*, 123 Pa. St. 240; 16 Atl. Rep. 594; *Fairchild v. Dunbar Furnace Co.*, 128 Pa. St. 485; 18 Atl. Rep. 443; *Lillibridge v. Lackawanna, etc., Co.*, 143 Pa. St. 293; 22 Atl. Rep. 1035; *Kingsley v. Hillside, etc., Co.*, 144 Pa. St. 613; 23 Atl. Rep. 250; *Lazarus' Estate*, 145 Pa. St. 1; 23 Atl. Rep. 372; *Plummer v. Hillside, etc., Co.*, 160 Pa. St. 483; 28 Atl. Rep. 853; *Powell v. Lantz*, 173 Pa. St. 543; 34 Atl. Rep. 450; *Massot v. Moses*, 3 S. C. 168; *Lee v. Baumgardner*, 86 Va. 315; 10 S. E. Rep. 3.

administrator.⁵⁰ Since oil and gas is also a mineral and a part of the soil which holds it, belonging to the owner of such soil, and the subject of a distinct conveyance which gives the grantee (by whatever name he may be called) an interest, it necessarily follows that a grant of the oil and gas beneath the surface of a tract of land will pass to the heir of the grantee and not to his personal representatives; but if the instrument gives the grantee a mere lease and does not give him an interest in the land, it does pass to his administrator.⁵¹

§ 65. Lease and not a license.

It is often difficult to determine whether an instrument is a lease or a license; and in fact courts differ so much that their decisions on the question cannot be reconciled. The same instrument will be considered a lease by some courts and a license by others. We give several examples that have been construed by the courts. An instrument which grants, demises and lets "all petroleum and gas in or under that certain tract of land . . . and also all the said tract of land for the purpose and for the exclusive right to drill and operate upon said premises for said petroleum and gas," for a limited time, is a lease and not a mere license.⁵² An instrument for a year containing the following clause: "The party of the second part hereby agrees to work said mine in a workmanlike manner, and to pay to the party of the first part royalty from all ores taken out . . . from the mine by the party of the second part"—constitutes a lease, and not a mere license.⁵³

⁵⁰ Barksdale v. Parker, 87 Va. 141; 12 S. E. Rep. 342; Keeler v. Trueman, 15 Colo. 143; 25 Pac. Rep. 311; Carrhart v. Montana, etc., Co., 1 Mont. 245.

⁵¹ Lanyon Zinc Co. v. Freeman, 68 Kan. 691; 75 Pac. 995. Where a statute provided that oil wells and fixtures, and rights held by virtue of any lease, should be deemed personal property for all purposes except taxation, the right to oil is personalty, and does not pass under a deed executed by an executor, the devisee of the lessee having the right

to convey all the lands owned by the latter, or in which he has an interest. Wagner v. Mallory, 169 N. Y. 501; 62 N. E. Rep. 584; affirming 58 N. Y. Supp. 526.

⁵² Woodland Oil Co. v. Crawford, 55 Ohio St. 161; 36 Ohio L. J. 231; 44 N. E. Rep. 1093; 34 L. R. A. 62; Brown v. Fowler, 65 Ohio St. 507; 63 N. E. 76; Martin v. Jones, 62 Ohio St. 519; 57 N. E. 238.

⁵³ Paul v. Cragnas, 25 Nev. 293; 59 Pac. Rep. 857; 60 Pac. Rep. 983; 47 L. R. A. 540.

An agreement giving an exclusive right to mine coal on certain land for a term of years is a lease and not a mere license.⁵⁴ An agreement of an owner of mining lands, allowing a person to enter on them at a particular place and have exclusive possession to dig for minerals thereon, so long as he complies with the conditions of the contract, is a lease and not a license.⁵⁵ An instrument in terms granting all the oil, gas, coal, and asphaltum under certain described land, but which was denominated a lease, had a definite term of fifteen years; and provided, in addition to a cash payment of \$50, for the payment of a royalty on all oil produced, was held not to be a conveyance in fee of the mineral in place, but merely a lease.^{55a}

§ 66. License.

As said previously, a license may be created by parol, and whatever right is attempted to be given by parol is a mere license and nothing more. As oil or gas is a mineral, a parol grant to bore for either of them is merely a license. But when the oil has been severed from the ground, and put into a pipe line or a tank, it becomes personal property of the licensee; and so the same is true of gas.⁵⁶ This is the case with respect to hard

⁵⁴ Consolidated Coal Co. v. Peers, 150 Ill. 344; 37 N. E. Rep. 937; Harlan v. Coal Co., 35 Pa. St. 287; Marquis of Bute v. Thompson, 13 M. and W. 487; 14 L. J. Exch. 95; Massot v. Moses, 3 S. C. 168; Fisher v. Crescent Oil Co. (Tex. Civ. App.), 178 S. W. 905.

⁵⁵ Buchanan v. Cole, 57 Mo. App. 11. See also Young v. Ellis, 91 Va. 297; 21 S. E. Rep. 480; Harlan v. Lehigh Coal Co., 35 Pa. St. 287; Funk v. Haldeman, 53 Pa. 229 (oil license); Dark v. Johnston, 55 Pa. 154 (oil license); Kelly v. Keys, 213 Pa. 296; 62 Atl. 911; 110 Am. St. 547 (oil license); Carr v. Benson, L. R. 3 Ch. App. 524; 78 L. T. 696; 16 W. R. 744; Hodgson v. Parkins, 84 Va. 706; 5 S. E. Rep. 710.

See also Poe v. Ulrey, 233 Ill. 56; 84 N. E. Rep. 46.

^{55a} Moore v. Sawyer, 167 Fed. Rep. 826.

Where an oil lease merely gives such land as was necessary to operate wells, it cannot be shown that there was an understanding that for each well opened the lessee should be entitled to an acre of land. Moore v. Decker (Tex. Civ. App.), 176 S. W. 816.

Where land was rented verbally, and, after entry by the tenant, the landholder stated that as long as the tenant paid her rent she could have the place, the contract was held not obnoxious to the statute of frauds. Hamlett v. Coates (Tex. Civ. App.), 182 S. W. 1144.

⁵⁶ Heller v. Dailey, 28 Ind. App. 555; 63 N. E. Rep. 490; Wagner v. Mallory, 169 N. Y. 501; 62 N. E. Rep. 584; Parish Fork Oil Co. v.

minerals.⁵⁷ One operating under a parol license is not a tenant of the licensor; nor is he a trespasser.⁵⁸ A mere license to mine is not assignable—it is a mere personal privilege.⁵⁹ One tenant in common cannot bind his co-tenant by giving a license.⁶⁰ A subsequent lessee or licensee with knowledge of the first license takes it subject thereto.⁶¹ A husband may give a license to mine on the homestead premises, without the consent of his wife, if the mining does not impair its enjoyment for the uses of a homestead; and even though her consent was necessary, yet it will be inferred if she had full knowledge of the work done, or expenses incurred, and made no objection.⁶² The

Bridgewater Gas Co., 51 W. Va. 581; 42 S. E. Rep. 655.

⁵⁷ *Williams v. Morrison*, 32 Fed. Rep. 177; *Wheeler v. West*, 71 Cal. 126; 11 Pac. Rep. 871; *Omaha, etc., Co. v. Tabor*, 13 Colo. 41; 21 Pac. Rep. 925.

In Utah a parol lease of a mine is valid, if the lessee has entered and expended labor and money in preparations for mining. *Ruffatti v. Societe, etc.*, 10 Utah 386; 37 Pac. Rep. 591.

⁵⁸ *Wheeler v. West*, 71 Cal. 126; 11 Pac. Rep. 871; *Kamphouse v. Gaffner*, 73 Ill. 453; *Desloge v. Pearce*, 38 Mo. 588.

⁵⁹ *Manning v. Frazier*, 96 Ill. 279; *East Jersey Co. v. Wright*, 32 N. J. Eq. 248; *Cahoon v. Bayaud*, 123 N. Y. 298; 25 N. E. Rep. 376; *Dark v. Johnston*, 55 Pa. St. 164; *Hodgson v. Perkins*, 84 Va. 706; 5 S. E. 710; *Dark v. Johnston*, 55 Pa. 154. A license coupled with an interest is assignable. *Funk v. Haldeman*, 53 Pa. St. 229.

⁶⁰ *Tipping v. Robbins*, 64 Wis. 546; 25 N. W. Rep. 713; *Tipping v. Robbins*, 71 Wis. 507; 37 N. W. Rep. 427.

⁶¹ *Harkness v. Burton*, 39 Ia. 101.

⁶² *Harkness v. Burton*, *supra*.

If the rent or royalty be payable

to them jointly, then in an action to enjoin the lessee from drilling because the lease, if properly reformed, would show it had expired, the wife is a necessary party. *Coffman v. Hope Natural Gas Co.*, 74 W. Va. 57, 81 S. E. 575.

In Illinois a lease of unlimited duration giving the lessee the right to enter on land occupied as a homestead to prospect for, and mine oil and gas, and erect necessary buildings and structures, is a conveyance of such an interest in the homestead as is void, unless the lease is executed and acknowledged as provided for by the statute concerning the conveyance of homesteads. *Gillespie v. Fulton Oil & Gas Co.*, 236 Ill. 188; 86 N. E. Rep. 219; *Poe v. Ulrey*, 233 Ill. 56; 84 N. E. Rep. 46; *Gillespie v. Fulton Oil & Gas Co.*, 140 Ill. App. 147; *Bruner v. Hicks*, 230 Ill. 536; 82 N. E. Rep. 888. See, also, *Daughtee v. Ohio Oil Co.*, 263 Ill. 518; 105 N. E. 308; affirming 181 Ill. App. 135.

Where, in an action by a gas company to enjoin a forcible removal or destruction of its pipe line across a homestead, it appears that both the husband and wife consented that the line be laid, whether such consent was jointly given is immate-

owner of land leased it ten years for mining purposes; and subsequently entered into an agreement, before the term had expired, with the lessee by which it was agreed that if the latter would sink a well, plank it, and put in a pump and engine, he should be entitled to dig all the ore on the lessor's land, paying twenty-five cents per ton for it. It was held that this was not a conveyance of the ore, but a mere license to take it, the compensation for the privilege of taking it being rated at twenty-five cents a ton.⁶³ An owner of land bequeathed it to his son, using the following language: "To my son, John, I give and bequeath the farm or plantation he now occupies; to be enjoyed by him, his heirs and assigns forever, with free privilege of taking what coal he wants for his own use or plantation off the home plantation." At the time the will was made, an open mine existed on the home plantation, but none on the farm occupied by the son. It was held that the privilege of taking coal from the home plantation was personal to the son, and did not pass to his successors in title to the premises devised.⁶⁴ An agreement giving "the exclusive use and privilege of digging, hauling off, and working any ore now found, or which may hereafter be found, anywhere" on a certain tract of land, confers a mere license, and creates no easement or estate in the land.⁶⁵ In Pennsylvania a lessee of oil territory who has exclusive privilege of the land for the purpose of searching for oil, producing, storing and transporting it, is more than a mere licensee—he is a tenant.⁶⁶ A conveyance of "the free and uninterrupted use, privilege, and liberty to go on to any part" of a certain described tract of land "for the purpose of prospecting, digging, excavating, and boring and erecting machinery" "necessary for prospecting, experimenting, or searching to find oil," with a right to

rial. *Ralston v. Wichita Natural Gas Co.*, 105 Pac. 430; 81 Kan. 86.

⁶³ *Neumoyer v. Andreas*, 57 Pa. St. 446. The court distinguishes this case from the case of *Caldwell v. Fulton*, 7 Casey 475, and says it closely follows *Johnston Iron Co. v. Cambria Iron Co.*, 8 Casey 241, and *Clement v. Younger*, 4 Wright (Pa.), 341.

⁶⁴ *Youghiogheny R. Coal Co. v. Pierce*, 153 Pa. St. 74; 25 Atl. Rep. 1026.

⁶⁵ *Barksdale v. Hairston*, 81 Va. 764; *Hodgson v. Perkins*, 84 Va. 706; 5 S. E. 710.

⁶⁶ *Kitehen v. Smith*, 101 Pa. St. 452; *Duke v. Hague*, 107 Pa. St. 57; *Chicago, etc., Co. v. United States, etc., Co.*, 57 Pa. St. 83.

the exclusive use of one acre about each well, and a right of way for "himself, lands, and teams, tenants and undertenants, occupiers or possessors of said springs, mines, ores, or coal beds, in common with" the grantor, the consideration being two hundred dollars, and if oil or minerals were found, one-third of the product, and if none be found, the premises to revert to the grantor—creates a license coupled with an interest to work the land for minerals.⁶⁷ Where an owner of an island and a farm granted the right to search for oil on the island, and agreed if the grantee found oil there, to sell him the island for a named sum; and he also gave him the exclusive right to bore wells on the farm, at a certain rent for each well, and that he might remove the machinery if unsuccessful, this was held to be personal license, and not assignable.⁶⁸ A quit claim deed has been held to be a mere license to mine.⁶⁹ A contract of sale and purchase, absolute in form, but requiring payment to be made out of mineral produced from the land, has been held to be a mere option, coupled with a license to work.⁷⁰ So a gas and oil lease conferring on the lessee the right to enter upon, operate for, and procure gas and oil on the land therein described, and containing no provision indicating otherwise, was held to grant a license to enter and explore, and, if gas or oil was found, the right to produce and sever it.^{70a}

§ 67. License.—Consideration.—Revocation.

A license reduced to writing, if supported by a sufficient consideration, may be irrevocable. Such a license may have the force of an incorporeal hereditament, and take effect as a covenant.⁷¹ Such a license is one coupled with an interest.⁷²

⁶⁷ Funk v. Haldeman, 53 Pa. St. 229.

⁶⁸ Dark v. Johnston, 55 Pa. St. 164; 9 Morr. Min. Rep. 283; Rynd v. Rynd Farm Oil Co., 63 Pa. St. 397; Thompson's Appeal, 101 Pa. St. 225; Lynch v. Seymour, 15 Can. Sup. Ct. Rep. 341; Kelly v. Keys, 213 Pa. 296; 62 Atl. 911; 110 Am. St. 587.

⁶⁹ Baker v. Clark, 128 Cal. 181; 60 Pac. Rep. 677; McMillan v. Titus, 222 Pa. 500; 72 Atl. 240.

⁷⁰ Smith v. Jones, 21 Utah 270; 60 Pac. Rep. 1104.

^{70a} Kansas Natural Gas Co. v. Board, 75 Kan. 335; 89 Pac. Rep. 750; Martel v. Jennings-Heywood Oil Syndicate, 114 La. 903; 38 So. 253.

⁷¹ Boone v. Stover, 66 Mo. 530; Desloge v. Pearce, 38 Mo. 588; Grubb v. Bayard, 2 Wall. Jr. 81; Grubb v. Guilford, 4 Watts (Pa.) 223. See Pifer v. Brown, 43 W. Va. 412; 27 S. E. 399; 49 L. R. A. 497; and note in last volume.

⁷² Brown v. Beecher, 120 Pa. St. 590; 15 Atl. Rep. 608; Funk v. Haldeman, 53 Pa. St. 229.

Thus where a license was given, in consideration of one hundred dollars already paid, of an exclusive privilege to drill oil wells on certain land for the term of ten years, the licensee to pay ten dollars a year for each well drilled from which he continuously pumped oil, it was held to be an irrevocable license.⁷³

§ 68. License, revocation.

While a parol license protects the licensee against the charge of trespass so long as it is in force, yet the licensor may revoke it at any time. A conveyance of the property is a revocation of the license,⁷⁴ for the reason that a license is purely personal, and not a part of the land.⁷⁵ But after a license has been fully executed, and is not dependent on continuous acts, it cannot be revoked.⁷⁶ Improvements placed upon the ground will not prevent the revocation of a parol license;⁷⁷ but the licensor must

⁷³ *Dark v. Johnston*, 55 Pa. St. 164; 93 Am. Dec. 732; 9 Morr. Min. Rep. 283; *Grubb v. Bayard*, 2 Wall Jr. 81; 11 Fed. Cas. 89; *Pyle v. Henderson*, 65 W. Va. 39; 63 S. E. Rep. 762. But while the courts treat the privilege given in these cases as licenses, it may well be doubted if the instruments did not give an actual interest in the real estate itself.

⁷⁴ *East Jersey Co. v. Wright*, 32 N. J. Eq. 248.

⁷⁵ *Kamphouse v. Gaffner*, 73 Ill. 453; *Barry v. Worcester*, 143 Mass. 476; 10 N. E. Rep. 186; *Desloge v. Pearce*, 38 Mo. 588; *Barksdale v. Hairston*, 81 Va. 764; *Geiger v. Green*, 4 Gill (Md.) 472; *Miser v. O'Shea*, 37 Ore. 231; 62 Pac. Rep. 491; *Wheeler v. West*, 71 Cal. 126; 11 Pac. Rep. 871; *Omaha, etc., Co. v. Tabor*, 13 Colo. 41; 21 Pac. Rep. 925; 5 L. R. A. 236; *Kiddle v. Brown*, 20 Ala. 412; 56 Am. Dec. 202.

⁷⁶ *Kamphouse v. Gaffner*, *supra*; *Funk v. Haldeman*, 53 Pa. St. 229; *Rynd v. Rynd Farm Oil Co.*, 63 Pa. St. 397; *Le Fevre v. Le Fevre*, 4 S.

and R. 241; *Wood v. Leadbitter*, 13 M. and W. 838; *Dark v. Johnston*, 55 Pa. St. 164; 93 Am. Dec. 732.

An option to purchase mining lands, with privilege of prospecting and mining ore is a license coupled with an interest; and the licensee having gone into possession and made expenditures, the license is irrevocable, and he is entitled to exclusive possession during the life of the agreement, and has, during such time, an interest in the realty and ore produced. *Hall v. Abraham*, 44 Ore. 477; 75 Pac. Rep. 882.

⁷⁷ *Kamphouse v. Gaffner*, *supra*.

A custom in mining districts that a prospector who has gone upon the premises of another to mine under an oral license shall be allowed to remain and work out the prospect of ore against the will of the owner, is opposed to the statute of frauds, and cannot prevent a revocation of the license, even though expense has been incurred and improvement made on the faith thereof. *Entwhistle v. Henke*, 211 Ill. 273; 71 N. E. Rep. 990; affirming 113 Ill. App. 572.

give the licensee the common law notice of six months—the notice due a tenant at will—or refund to him his expenditure in making the improvements. The object of the six months' notice is to make the improvements available.⁷⁸ The fact that the licensee had not worked a mine, under a license, long enough to reward him for labor and expenditures made—will not prohibit the revocation of his license.⁷⁹ Upon a revocation of the license by notice the licensee may remove his machinery and fixtures.⁸⁰ After revocation, if the licensee take out mineral, he acquires no title to it.⁸¹ A license given to a partnership to take out mineral is revoked by a dissolution of the partnership.⁸²

§ 69. Merger.

If the lessor convey the fee to the lessee, there is a merger of the estate, and the lease ceases to exist.⁸³ So if the event happens upon which the lease is to cease, there is a merger.⁸⁴ And the same is true where the owner may and does abandon his lease; or, where he may not abandon it, the lessor acquiescing in his abandoning it.⁸⁵ So a deed of conveyance will merge all previous contracts with respect to the land between the vendor and vendee, although in writing.⁸⁶ If a co-lessee purchase the lands of the lessor or his grantee, such co-lessee becomes the absolute owner of the royalty reserved in the lease due from the other lessee, in the proportion the shares held by him bears to that of such co-lessee; but the latter's interest is merged in

⁷⁸ *Bush v. Sullivan*, 3 Greene (Ia.) 344; 54 Am. Dec. 506; *Beatty v. Gregory*, 17 Ia. 109; 85 Am. Dec. 546; *Harkness v. Burton*, 39 Ia. 101; *Huff v. McCauley*, 53 Pa. St. 206; *Funk v. Haldeman*, 53 Pa. St. 229.

⁷⁹ *Desloge v. Pearce*, *supra*.

⁸⁰ *Desloge v. Pearce*, *supra*.

⁸¹ *Lunsford v. La Motte Lead Co.*, 54 Mo. 426. See *Chynowitch v. Granby, etc., Co.*, 74 Mo. 173.

⁸² *Barksdale v. Hairston*, 81 Va. 764.

⁸³ *Snoddy v. Bolen*, 122 Mo. 479; 24 S. W. Rep. 142; *Detlor v. Holland*, 57 Ohio St. 492; 49 N. E. Rep. 690; 40 L. R. A. 266; *Silva v.*

Rankin, 80 Ga. 79; 4 S. E. Rep. 756; *Carroll v. Provincial, etc., Co.*, 26 Can. S. C. 591.

⁸⁴ *State v. Coosaw Mining Co.*, 47 Fed. Rep. 225; *Fairchild v. Dunbar*, 128 Pa. St. 485; 18 Atl. Rep. 443.

⁸⁵ *Elk Fork Oil and Gas Co. v. Jennings*, 84 Fed. Rep. 839; *Bloomfield Coal, etc., Co. v. Tidrick*, 99 Ia. 83; 68 N. W. Rep. 570; *Hawkins v. Pepper*, 117 N. C. 407; 23 S. E. Rep. 434; *Stage v. Boyer*, 183 Pa. St. 560; 38 Atl. Rep. 1035.

⁸⁶ *Carroll v. Prudence, etc., Co.*, 26 Can. S. C. 591; *Raymond v. Johnson*, 17 Wash. 232; 49 Pac. Rep. 492.

the fee.⁸⁷ So if two owners of separate properties make a joint lease of both tracts, and the lessee purchase one of the tracts, the lease as to it is merged, and thereafter the lessee pays only one-half the rent he was to have paid the two lessors.⁸⁸

§ 70. Consideration.(a)

Every lease to be binding must be based upon a consideration; if it is not, it is void.⁸⁹ Thus where the lease did not bind the lessee to begin and prosecute the work with diligence, and the only consideration for it was a part of the oil produced, it was held that it was void for want of mutuality.⁹⁰ The same result was unhesitatingly reached where the lessee had a right at any time to surrender the lease without paying therefor, and was not bound to begin operations, the only consideration being a part of the oil produced.⁹¹ An agreement, however, to pay a dollar an acre rent, or sink a well as the lessee may see fit, the work to begin by a certain time, and the lessor to have a certain part of the oil produced and so much for each gas well developed, is supported by a sufficient consideration.⁹² Where one

⁸⁷ *Northwestern, etc., Co. v. Davis*, 9 Ohio C. Ct. Rep. 551; 38 Wkly. L. Bull. 200; 40 Wkly. L. Bull. 251; 6 Ohio Cir. Dec. 529.

⁸⁸ *Higgins v. California, etc., Co.*, 109 Cal. 304; 41 Pac. Rep. 1087.

(a) Forfeiture, § 890.

⁸⁹ *Foster v. Elk Fork, etc., Co.*, 90 Fed. Rep. 178; 61 U. S. App. 576; 32 C. C. A. 560; *Huggins v. Daley*, 99 Fed. Rep. 606; 40 C. C. A. 12; 48 L. R. A. 320; *Brewster v. Lanyon Zinc Co.*, 140 Fed. 801; 72 C. C. A. 213; *Central Ohio Nat. Gas Co. v. Eckert*, 70 Ohio St. 127; 71 N. E. 281; *Allegheny Oil Co. v. Snyder*, 106 Fed. 764; 45 C. C. A. 604. See § 766, note 35.

A provision in an Oklahoma lease, that the lessee should deposit \$500 in a bank as security, and that the lessor, on the lessee's noncompliance with the lease, should hold such sum and demand possession, held a provision for a penalty for nonperformance and therefore void, under Rev. Laws, 1910, Secs. 974, 975. *Hargrove v. Bourne* (Okla.), 150 P. 121.

⁹⁰ *Foster v. Elk Fork, etc., Co.*, *supra*.

Though an oil lease, for a money

consideration, does not bind a lessee to drill or pay money in lieu thereof, but leaves it optional with him to do so or not, yet the lessor cannot evade the lease for want of mutuality. *Pyle v. Henderson*, 65 W. Va. 39; 63 S. E. Rep. 762.

⁹¹ *Eclipse Oil Co. v. South Penn. Oil Co.*, 47 W. Va. 84; 34 S. E. Rep. 923; *Trees v. Eclipse Oil Co.*, 47 W. Va. 107; 34 S. E. Rep. 933.

⁹² *McMillan v. Philadelphia Co.*, 159 Pa. St. 142; 28 Atl. Rep. 220; *Allegheny Oil Co. v. Snyder*, 106 Fed. Rep. 764; *Jennings-Heywood Oil Syndicate v. Houssiere, etc.*, Oil Co., 119 La. 793; 44 So. Rep. 481; *Friend v. Mallory*, 52 W. Va. 53; 43 S. E. 114; *Pittsburg, etc., Brick Co. v. Bailey*, 76 Kan. 42; 90 Pac. Rep. 803; 13 L. R. A. (N. S.) 745.

Where the real consideration for the execution of the lease was the exploration of the mineral resources of the farm, and not the recited consideration of one dollar, it was held that the nonpayment of one dollar did not invalidate the lease. *Gillespie v. Fulton Oil & Gas Co.*, 236 Ill. 188; 86 N. E. Rep. 219; *Murray v. Barnhart*, 117 La. 1023; 42 So. Rep. 489.

dollar was paid for a lease, to run two years, with the privilege of twenty-five years on payment of one dollar per acre, it was held there was a sufficient consideration to hold it.⁹³ But where the consideration was nominal, and the lessee led the lessor to believe operations would begin soon, but the lessee had the power to postpone operations on payment of a small sum of money, a court of equity refused to uphold the lease, regarding it merely as an option.⁹⁴ Where the lessee agreed to complete a second well within a certain time after the completion of the first one, but did not agree to complete or even commence such first one, as to the second well it was held there was no consideration for the contract.⁹⁵ An agreement to pay "one dollar per acre each year," where no oil or gas was found within two years, was held too indefinite as an agreement for the further extension of the lease.⁹⁶ Where the lessee was to pay at least one thousand dollars per annum for the use of mining property, it was held not to be error to refuse to charge the jury that owing to the almost entire absence of ore in mining the consideration for the lease had failed.⁹⁷ A lease, on a consideration of one dollar paid, gave the lessee the right to drill for oil and gas, with privileges incidental to the production and removal of the oil and gas produced, for a term of two years, and as long thereafter as they should be found in paying quantities, not exceeding in all twenty-five years. The lessee was to pay a royalty on the production. It then provided that "in case no well shall be drilled on said premises within two years from the date hereof, this lease shall become null and void, unless the lessee shall pay for the further delay at the rate of one dollar per acre at or before the end of each year thereafter." It was held that the lease constituted an entire contract, and that the consideration recited in it supported both the grant of the two years' term and the privilege of extending the time for drilling by paying the stipulated price therefor.⁹⁸ The

⁹³ *Brown v. Ohio Oil Co.*, 21 Ohio C. C. 117; 11 Ohio C. C. Dec. 810; affirmed 65 Ohio St. 507; 63 N. E. Rep. 76. See also *Monfort v. Lanyon Zinc Co.*, 67 Kan. 310; 72 Pac. Rep. 784.

One dollar and rental thereafter, if oil be discovered, is a sufficient consideration for the lease. *Pittsburg Vitrified, etc., Co. v. Bailey*, 76 Kan. 42; 90 Pac. Rep. 803; 13 L. R. A. (N. S.) 745.

⁹⁴ *Eclipse Oil Co. v. South Penn. Oil Co.*, *supra*.

⁹⁵ *Federal Oil Co. v. Western Oil Co.*, 112 Fed. Rep. 373.

⁹⁶ *Brown v. Fowler*, 65 Ohio St. 507; 63 N. E. Rep. 76.

⁹⁷ *Barnford v. Lehigh Zinc and Iron Co.*, 33 Fed. Rep. 677.

⁹⁸ *Allegheny Oil Co. v. Snyder*, 106 Fed. Rep. 764; 45 C. C. A. 604.

payment of one dollar, and the erection of valuable machinery on the demised premises, has been held to be a sufficient consideration for a lease.⁹⁹ Where the lease required the lessee to commence a test well on the premises within a certain time, and this requirement was complied with, it was held that there was a sufficient consideration for such lease.¹⁰⁰

"A person or company purposing to obtain natural gas in large quantity for sale or for manufacturing purposes, finds it desirable to acquire exclusive right to search for the fugitive mineral in a large contiguous area or areas; and though it be not necessary for the proper development of a particular well or to drill wells upon the land of all the several proprietors within the district, it is desirable and profitable to have no competing wells on the territory near to the wells deemed sufficient for the development of the territory. This accounts for and leads to the insertion in contracts made between such prospectors and the landowners of provisions for exclusive rights, and stipulations forbidding the landowners from drilling wells upon their own land or permitting others to do so; also, along with a provision for an exclusive right, it is common to insert a stipulation for the privilege of delay in drilling wells upon a specified consideration. Such provisions constitute valuable considerations in these contracts."¹⁰¹

⁹⁹ *Herrington v. Wood*, 6 Ohio C. Rep. 326; 3 Ohio Cir. Dec. 475.

¹⁰⁰ *Stahl v. Van Vleck*, 53 Ohio St. 136; 41 N. E. Rep. 35; 33 Wkly. L. Bull. 335.

Where the lessee agrees to complete a second well within ninety days after the completion of the first, but does not agree to complete or even commence the first well, such agreement as to the second well is no consideration for the contract. *Federal Oil Co. v. Western Oil Co.*, 112 Fed. 373; affirmed 121 Fed. 674; 57 C. C. A. 428.

¹⁰¹ *Simpson v. Pittsburg, etc., Co.*, 28 Ind. App. 343; 62 N. E. Rep. 753.

An oil lease granting the lessee the right to operate on forty acres

of land on which oil had never been produced, and worth only \$10 an acre, under a contract to begin operations in six months, or \$5 quarterly in advance for each three months delay and for a payment of royalty on the oil severed and the gas marketed, was held to be based on a sufficient consideration. *Heywood Oil Syndicate v. Houssiere-Latrelle Oil Co.*, 119 La. 793; 44 So. Rep. 481; *Pittsburgh, etc., Brick Co. v. Bailey*, 76 Kan. 42; 90 Pac. Rep. 803; 13 L. R. A. (N. S.) 745; *Dill v. Frazee*, 169 Ind. 53; 79 N. E. 791 (as against assignee of lease a small consideration is valid).

A cash payment down of \$1, with a covenant to deliver to the lessor, free of cost, one-eighth of all

§ 71. Option to purchase after development.

A lease provided that "after the first well is completed, provided it is a paying well, said second party shall have the privi-

oil produced, and pay 25 cents per acre per year during the period there is no development not to extend beyond five years, rests on a sufficient consideration. *Guffey v. Smith*, 237 U. S. 101, 35 Sup. Ct. 526; 59 L. Ed. 866; reversing 202 Fed. 106; 120 C. C. A. 438.

A cash payment of \$1, for four months is sufficient to support the lease, at the end of which a well is to be drilled. *Brown v. Wilson* (Okla.), 160 Pac. 94; L. R. A. 1917 B 1184. See, also, *Downey v. Good*, 240 Fed. 527.

A cash bonus of \$120 is sufficient to support each and every provision of an Oklahoma surrender clause. *Shaffer v. Marks*, 241 Fed. 139.

A court cannot assume without proof that a substantial consideration is inadequate and that some other consideration was implied or intended. *McClendon v. Busch-Everett Co.*, 138 La. 722; 70 So. 781.

Where the consideration for an option to drill for oil and mineral on lands in unproved territory, is 3 percent of the market value of the lands for one year, and a like amount for the next four years, the price cannot be said to be not "serious" or "out of proportion to the value," within Civ. Code art. 2464 of Louisiana. *Saunders v. Busch-Everett Co.*, 138 La. 1049; 71 So. 153.

Where such lease reserves to the lessee and his assigns the right at any time after four months, on the payment of \$1 and all payable obligations then due the lessor or his assigns, to surrender the lease, if

not tested, for cancellation, it was held, that, as said lease, construed as a whole, confers on the lessee an option to complete a well within four months, and thereby avoid doing both, it was avoidable at the option of the lessor at any time after four months for lack of mutuality, in that it imposed no legal obligation on the lessee; that, as prospective royalties were the sole consideration for the execution of the lease on the part of the lessor, payment of which could be defeated by a surrender thereof by the lessee, the lease was nudum pactum; and that, as the same reserves to the lessee the right to surrender the lease at any time after four months before development, a corresponding right exists in the lessor to compel a surrender. *Brown v. Wilson* (Okla.), 160 Pac. 94; L. R. A. 1917 B 1184. See this case commented on in *Shaffer v. Marks*, 241 Fed. 139.

A test well having been commenced and completed at a designated place within ninety days and the existence of oil ascertained sufficiently complies with the alternative provision of a lease requiring lessees "to commence a test oil or gas well" at that place in ninety days, and the fact that such well was immediately plugged and casing withdrawn and all operations thereon had ceased for several months does not defeat the consideration for the lease. *Stahl v. Van Vleck*, 30 Ohio Cir. Ct. R. 755.

An agreement by a lessor to reduce the annual gas rental provided for by his lease if the lessee would

lege of buying or leasing the remainder of said Schuler farm, provided he and said Schuler can agree upon the terms within six months." The court did not consider this was an option in the ordinary sense of the term, nor an offer to the lessee of the remainder of the farm upon defined terms, either of purchase or of lease on royalty, by the acceptance of which he could become either a purchaser or a lessee.¹⁰²

§ 72. Option to extend lease—Consideration.

A lease, given for five years, required the lessee to drill a well within six months, or in default pay for further delay an annual rental in advance, until a well should be completed.

lay a pipe line to the well and utilize the gas is founded on a sufficient consideration, and will be enforced. *Consumers' Heating Co. v. American Land Co.*, 31 Pittsb. Leg. J. (N. S.) 24.

The consideration of an oil lease having a granting clause, a habendum clause, a condition subsequent, and a surrender clause, applies to the whole lease, and to each clause of it. *Brown v. Fowler*, 65 Ohio St. 507; 63 N. E. Rep. 76.

If there be no obligation resting on the lessee under the lease, there is no consideration moving to the lessor, and there is no contract. *Caddo Oil & Mining Co. v. Producers Oil Co.*, 134 La. 701, 54 So. 684.

A mere nominal consideration (\$5.00) will not render a lease valid. *Owens v. Corsicana Petroleum Co.* (Tex. Civ. App.), 169 S. W. 192.

¹⁰² *Childs v. Gillespie*, 147 Pa. St. 173; 23 S. E. Rep. 312. See case of a coal lease. *Pollard v. Sayre*, 45 Colo. 195; 98 Pac. Rep. 816.

A lease of asphalt land provided that if, on or before July 1, 1900, the lessees should not have paid

royalty on 34,000 tons of asphalt at the rate fixed, they should pay to the lessor on such day royalty equal to the difference between the royalty paid and that payable on that number of tons, and if at that time the lessees should have performed all the conditions contained in the lease, the lessor covenanted to renew the lease at the lessees' option. It was held that the conditions for *renewal and payment were concurrent*, and the lessor, having refused to renew, was not entitled to recover the differential payment provided for. *Warner v. Cochrane*, 128 F. 553; 63 C. C. A. 207.

Where the lessee served notice of an intention to exercise his right of purchase and take the premises, and a deed was then prepared but not delivered for three months, because of failure of the lessee to pay the purchase money, it was held that the lessee must pay for the coal he had mined during the three months of delay, for the contract of purchase was not completed when the option of purchase was exercised. *Flynn v. White Breast Coal Co.*, 72 Ia. 738; 32 N. W. Rep. 471.

For a failure to complete the well or pay the rental for ten days after the time specified, the lease should be void, only to be renewed by mutual consent; and "no right of action should after such failure accrue to either party on account of the breach of any condition" in the lease. The lease was construed to give the lessee an option to put down a well within six months, and by paying the rental named, the further option for one year.¹⁰³ Where it is optional with the lessee whether he will take the land or not at the end of the year, and the lessor represents to the lessee he would extend the time, and, on the faith of such

¹⁰³ *Van Voorhis v. Oliver*, 22 Pittsb. L. J. (N. S.) 114.

A grant to a corporation, its successors and assigns, of all the oil and gas in and under a tract of land, on consideration that the second party shall drill a well within six months, or thereafter pay a certain annual sum, or reconvey the property to the first party, and that the lessee may at any time remove its property and reconvey the premises, whereupon the lease shall be void, after six months, and until a well is drilled, is a lease at an annual rental, at the option of the lessee only. *Central Ohio Natural Gas & Fuel Co. v. Eckert*, 70 Ohio 127; 71 N. E. 281. See, also, *Leonard v. Busch-Everett Co.*, 139 La. 1099; 72 So. 748.

Where a lease of asphalt land provided for a renewal concurrently on the payment by the lessees of a sum equal to the difference between the royalty paid and that which would be payable on a specified number of tons of asphalt, and the lessor wrongfully refused to make such renewals, the lessees or their assignees were at liberty either to tender such differential rent and insist on specific performance of the covenant to renew, or refuse payment, and treat the contract as at an end. *Warner*

v. Cochrane, 128 F. 553; 63 C. C. A. 207.

A gas lease is not void merely because the lessee stipulates that at the end of a certain period he shall have the right to keep the lease in force by then doing some act which at the date of the lease he is unable to perform. *Ringle v. Quigg*, 74 Kan. 581; 87 Pac. Rep. 724.

One of the lessees in a lease of oil lands parted with all interest therein and thereafter purchased a fourth interest in the fee of land other than that covered by the original lease. Thereafter the owner of the land covered by the original lease contracted in writing with the owner of the one-fourth interest in the other land, in which it was recited that he was a part owner in such land, and agreed that, when he became owner of the three-fourths of such land, he would extend the original lease to the owner of the quarter interest, and the latter agreed to surrender a certain interest in the oil produced as provided by the original lease. It was held that such agreement referred only to the fourth interest in the land purchased, and not to the land covered by the original lease in which the lessee had no further interest. *Collins v. South Penn. Oil Co.*, 222 Pa. 345; 71 Atl. 319.

representations, the lessee goes on and expends moneys, and carries out his part of the contract, the lessor will be bound; and if the property is community property, representations of the lessor's husband to the same effect, followed by the expenditure of money and carrying out the provisions of the lease, will bind the wife.¹⁰⁴ Where a gas and oil lease provided that the lessee should explore the lands for these minerals within a certain time, or pay a certain sum quarterly in case of delay, the lessor had no right to resume possession until default by the lessees, both in not exploring the land and not paying for the delay.^{104a}

§ 73. Acceptance of second lease by lessee of first lease.

If a lessee is improperly refused possession by the lessor, and assenting to this refusal he accepts a second lease for the same premises, the act of executing and accepting the second lease amounts to a rescinding of the first one and terminates all rights under it.^{104b} And an assignee of the first lease, who took it with notice of the execution of the second lease, is bound by

¹⁰¹ *Presidio Mining Co. v. Bullis*, 68 Tex. 581; 4 S. W. Rep. 860; *Pittsburg, etc., Brick Co. v. Bailey*, 76 Kan. 42; 90 Pac. Rep. 803; 13 L. R. A. (N. S.) 745.

^{104a} *Houssiere-Latreille Oil Co. v. Jennings-Heywood Oil Syndicate*, 115 La. 107; 38 So. Rep. 932.

A consideration of \$1 and part of the gas or oil developed is a sufficient consideration. *Superior Oil & Gas Co. v. Mehlín*, 25 Okl. 809; 108 Pac. 545, 138 Am. St. Rep. 942. \$24.00 per year for extension of time is a sufficient consideration. *Kolachmy v. Galbreath*, 26 Okl. 772, 110 Pac. 902; 38 L. R. A. (N. S.) 451; *Frank Oil Co. v. Bellevue Oil & Gas Co.*, 29 Okl. 719; 119 Pac. 260; 43 L. R. A. (N. S.) 487 (\$80.00 per year); *Ohio Oil Co. v. Dettimore*, 165 Ind. 243; 73 N. E. 906 (\$120.00 per year).

A provision in an oil and gas

lease that it shall be void if a well is not drilled within one year, unless the lessee each year shall pay a rental of 25 cents per acre, until a well is drilled, or until the lease is canceled, gives the lessee an option, and prevents the lessor on receiving the annual rental from forfeiting the lease. *Deming Inv. Co. v. Lanham*, 36 Okl. 773; 130 P. 250.

Where the lessor extended the time for commencing an oil well under the lease, six months after the expiration of the time generally fixed, in consideration of one dollar and of the lessee's agreement to drill first on adjoining land leased to him by the lessor's wife, the extension was held valid, and founded on a sufficient consideration. *Downey v. Gooch*, 240 Fed. 527.

^{104b} *Garrett v. South Penn. Oil Co.*, 66 W. Va. 587; 66 S. E. Rep. 741.

the result, even though he expend large sums of money in developing the premises before finding out that the lessor is treating such assignee's possession as one under the second lease which he had never seen. A mere rumor that the lease has been assigned is not sufficient to affect the lessor; but a communication made directly to him by either the lessee or assignee of the assignee's understanding, of his right of possession, will require him to act and be binding upon him.¹⁰⁵ The subsequent lessee cannot question the validity of the first lease on the ground that it lacks mutuality, or that it was revoked by the giving of a subsequent one.^{105a} Where A. and B. joined in a lease of their land to C., and thereafter the lease was abandoned, B. making a separate lease for one year on different terms, and on the discovery of oil on B.'s tract C.

¹⁰⁵ *Natural Gas Co. v. Philadelphia Co.*, 158 Pa. St. 317; 27 Atl. Rep. 951; *Elk Fork Oil & Gas Co. v. Jennings*, 84 Fed. 839; affirmed 90 Fed. 178; 32 C. C. A. 560; *Eaton v. Allegheny Gas Co.*, 122 N. Y. 416; 25 N. E. 981; *Pyle v. Henderson*, 65 W. Va. 39; 63 S. E. Rep. 762.

Where an agent of a lessee of oil lands, whose business it was to take leases, had knowledge of a prior lease at the time of taking his principal's lease, and the vice-president of such lease also had sufficient information to put him on inquiry, and the lessee interposed no defense of innocent purchaser, it was held that the lessee's rights were subordinate to those of the prior lessee. *South Penn. Oil Co. v. Stone* (Tenn. Ch. App.), 57 S. W. Rep. 374.

Where defendant claimed an interest in land as lessee under an oil and gas lease which plaintiff claimed was forfeited for nonpayment of rent, and defendant alleged that its assignor had made the payments before defendant procured the lease, evidence was admissible to show that the lease in question was but a sub-

stitution for a prior one between plaintiff and defendant's assignor, and that, when the later lease was made, the assignor was paying rent under the former one, and it was agreed between plaintiff and the assignor that the payments should continue under the later lease, and that the payments in question were made on the prior lease and not on the later one; the evidence not being addressed to what the terms of the new lease were or what the rights of the parties would be under it, but merely to the application of a payment of rent, and hence not being contradictory of the terms of the written lease. *Erie Crawford Oil Co. v. Jones*, 86 N. E. 1027; 43 Ind. App. 187.

If the first lease be recorded, all are charged with notice of the provisions. *Busch-Everett Co. v. Vivian Oil Co.*, 128 La. 886; 55 So. 564. So, if a suit be pending to cancel a lease, all are charged with notice of that fact. *Fox v. Simmons*, 251 Ill. 316; 96 N. E. 233.

^{105a} *Compton v. People's Gas Co.*, 75 Kan. 572; 89 Pac. Rep. 1039; 10 L. R. A. (N. S.) 787.

entered on the land of A. and was enjoined by A., who soon thereafter sold a one-fifth interest to plaintiffs in the land, they acquired a title free of the first lease, and were not affected by a subsequent compromise of the suit and a recognition by A. of the first lease in a modified form.^{105b} Any equities in favor of a lessor in an oil lease arising out of suppression of facts when the lease was made or failure to pay a bonus provided for therein, and the receipt of which was acknowledged, does not affect the validity of the lease in the hands of assignees who took it for value in good faith and without any knowledge of such facts.^{105c}

§ 74. Extension of time of lease may amount to a new lease.

The extension of the time of a lease may amount to a new lease. Thus where an oil lease was for a term of five years and as much longer as oil or gas was found or produced in paying quantities, the consideration being one-eighth of all the oil produced or found on the premises, delivered free of expense in the tanks or pipe lines to the credit of the lessor; and if gas was found in sufficient quantity to justify marketing it, then the consideration was a royalty of one hundred dollars a year for each well, so long as gas was used from it; and a well was to be completed within nine months, and in case of failure to do so, the lessee was to pay a yearly rental of fifty cents per acre, and it was conditioned that a failure to drill the well on time or pay the rent should render the lease "null and void," and to remain "without any effect between the parties;" and neither possession was taken nor work commenced within the five years, it was held that the lease terminated after the expiration of five years, as no gas or oil was produced within that time, and any extension of time after the expiration of the five years was in effect the execution of a new lease.¹⁰⁶ A deed conveyed one-sixteenth of the gas and oil under a tract

^{105b} Martel v. Jennings-Heywood Oil Syndicate, 114 La. 351; 38 So. Rep. 253.

^{105c} Moore v. Sawyer, 167 Fed. Rep. 826.

¹⁰⁶ Northwestern Ohio, etc., Co. v. City of Tiffin, 59 Ohio St. 420; 54

N. E. Rep. 77; 41 Wkly. L. Bull. 48. See Biven v. Ohio Oil Co., 11 Ohio C. C. Dec. 810; 21 Ohio C. C. 117; affirmed 65 Ohio St. 507; 63 N. E. Rep. 76. See also Martel v. Jennings-Heywood Oil Syndicate, 114 La. 351; 38 So. Rep. 253.

of land. It provided that it was subject to any rights existing in the lessee under a prior lease, but if that lease had expired or become void, or if no such lease ever existed, it then granted to the lessee all the rights and privileges of drilling and operating on the land to produce, store and remove "said oil and gas necessary and usually granted to the lessee in an oil and gas lease." It was held that the words "said oil" could not grammatically and did not refer to the one-sixteenth granted in fee, but referred to their next preceding antecedent, to wit, the oil and gas covered by the prior lease, and hence the new lease conveyed not only a one-sixteenth of all the oil and gas, but, subject to the prior lease, was a lease of the land to the grantee for oil and gas purposes, with exclusive rights, reserving the usual royalty and with covenants and agreements usually contained in an oil and gas lease.^{106a}

§ 75. Effect of payment of rent upon extension of lease in point of time.

Payment of rent instead of development of the land for gas and oil may have the effect to extend the time of the lease. Thus a provision in a lease that the annual rental should be payable within three months after the six months during which a well was to be completed was held to extend the lease one year from the termination of the six months' period, but not from the additional three months' period.^{106b} So where an oil lease was given for sixty days, and as much longer as gas and oil should be found in paying quantities, and it provided for the drilling of one well within sixty days, and on failure to commence drilling within such time the lessees were to pay \$50 per month in advance in full payment for such delay until one well should be completed, unless the lease was surrendered before payment was due, and that a failure to complete the drilling of a well or to pay any rental should render the lease void, it was held that on the hypothesis that the term was extended for sixty days in addition to the original term by a payment of \$50 per month, the lessees would not hold over

^{106a} Garrett v. South Penn. Oil Co., 66 W. Va. 587; 66 S. E. Rep. 741.
^{106b} Baker v. Stow, 30 Ohio Cir. Ct. Rep. 724.

longer than such additional time, unless they found and produced oil in paying quantities within that time.^{100c} But where a lease of two acres out of a large tract of land stated that it was to give the lessee the right to drill for oil or gas, and that it was for a term of twelve years, and so long thereafter as oil or gas could be produced in paying quantities, or payments afterward provided for were made; and it was then provided that the lessee should give the lessor one-eighth of all petroleum obtained from the premises, pay a certain sum annually for gas from each productive well, and furnish sufficient gas to heat and light the lessor's dwelling; and the lessee then covenanted to drill wells within one year, or, in lieu thereof, to pay a certain sum, which was to be payable each year until operations were commenced and a well completed, it was held that where no well had been drilled, the term of the lease could not be extended beyond twelve years by payment of the yearly rental therein provided for.^{100d} Where lessors accepted and used gas supplied by a gas company and paid for by the lessees, in consideration for which the lessees were granted an extension of time to open a well producing gas and oil, which by reason of the intermingling of the oil with the gas, and for want of marketable facilities of the oil, was unprofitable to operate for either gas or oil, it was held to neither extend the terms of the lease nor waive conditions of forfeiture for non-compliance therewith, especially after the expiration of the time contracted for and in the absence of a well profitably producing either. And it was further held that the lessor was not required directly to notify lessees to shut off the gas from the house after giving general notice of the expiration of the lease.^{100e} A gas lease required a well to be completed within a year. No time for the expiration of the lease was designated, except that it should terminate on failure to pro-

^{100c} *Murdock-West Co. v. Logan*, 69 Ohio St. 514; 69 N. E. Rep. 984.

^{100d} *Indiana Natural Gas & Oil Co. v. Beales* (Ind. App.), 74 N. E. Rep. 551. This case, however, was transferred to the Supreme Court of the State wherein the Appellate Court decided as above stated, and that court held that the lessor could

not, at the expiration of the twelve years, arbitrarily determine the lease without giving the lessee a reasonable time, after notice, within which to begin operations. *Indiana Natural Gas & Oil Co. v. Beales*, 166 Ind. 684; 76 N. E. Rep. 520.

^{100e} *Miller v. Vandergift*, 30 Ohio Cir. Ct. Rep. 730.

duce oil or gas in paying quantities. On completion of a well within the year, it was held that the lessor was not entitled to rental, payment of which was to be made if the well was not completed within the designated time. In this instance the lessees had made a cash payment of \$1,500 upon the date of the contract, and expended \$2,200 in developing a well within the designated time, though not a paying producer. It was held that they were entitled to a reasonable extension of time to make further search for oil and gas in paying quantities, and that an injunction would not lie within five months of the completion of such well, upon a refusal to pay such rental, to restrain them from entering upon the premises and operating them for oil and gas.^{106f} But where a contract granted an exclusive right to drill and operate oil and gas wells for a term of three years, and as much longer as oil and gas were found in paying quantities, in consideration for which the operators were to pay a royalty on oil produced and \$300 per well for gas, and, in case no well was drilled within the first six months, a stipulated rental per month, it was held that the contract terminated upon the expiration of three years unless gas or oil was produced in paying quantities. It was also held that the payment of yearly rental and tender of \$300 per year for non-producing gas well did not effect an extension of its terms; nor did a separate agreement upon consideration of three years and eight months after the date of the contract, granting an extension to a fixed date more than a year in the future, the terms of which was endorsed on the original agreement, continue the original contract in force beyond such fixed date, especially since no new nor further efforts had been made to develop gas or oil on the premises.^{106g}

^{106f} Deihl v. Ohio Oil Co., 30 Ohio Cir. Ct. Rep. 750.

^{106g} Northwestern Ohio Nat. Gas Co. v. Whitaere, 30 Ohio Cir. Ct. Rep. 737; Flanagan v. Marsh (Ky.), 32 Ky. L. Rep. 184; 105 S. W. Rep. 424; Indiana Natural Gas & Oil Co. v. Sexton, 39 Ind. App. 575; 68 N. E. Rep. 692; Erie Crawford Oil Co. v. Meeks, 40 Ind. App. 156; 81 N. E. Rep. 518; Indiana Natural Gas & Oil Co. v. Lee, 34 Ind. App. 119;

72 N. E. Rep. 492; Indiana Natural Gas & Oil Co. v. Grainger, 33 Ind. App. 559; 70 N. E. Rep. 395; Consumers' Gas Trust Co. v. Littler, 162 Ind. 320; 70 N. E. Rep. 363.

The provision of a gas and oil lease that the annual rental shall be payable within three months after the six months during which a well was to be completed extends the lease one year from the termination of the six months' period, and

§ 76. Options—Revocation.(a)

Options concerning oil or gas territory in the past have not been uncommon, much to the detriment of the owner of such territory. An option as applied to oil or gas territory is an offer which has not been accepted, containing the terms and conditions on which the person making it will sell or lease his premises, and giving the holder of it, or the person to whom it is made, a specified time within which to elect to accept it. The holder of the option is under no obligation to accept it, but if he elects to do so he must give the person making it notice of that fact. After notice given of an election to accept the offer, it becomes a valid and binding contract. But the acceptance must be made within the time fixed; for after that time has expired the owner of the premises is no longer bound by his offer, and the option is at an end.¹⁰⁷ Thus where the owner of land entered into an agreement providing that A should "have the right to enter upon the premises . . . with men, teams, and tools for the purpose of prospecting and examining for mines and minerals, and to dig, carry away, and test such portions," etc., "as he may think proper," . . . "and if he, after making such examination and test," etc., "shall be of opinion that they are worth working, he shall then have the right to go on and dig, carry away, and cause to be worked such of the substances there found," the expenses to be borne by A; it was held that the instrument conveyed no title to the land to A, but gave him a license or authority to enter upon the lands for the specific purpose of prospecting for minerals, and of extracting the ores, and if he considered them worth working, he had an option he could enforce. However, before he could acquire an interest in the land, he had to declare his election

not from the additional three months' period. *Baker v. Stow*, 30 Ohio Cir. Ct. R. 724.

Contract construed and held not to contain a postestative condition. *Busch-Everett Co. v. Vivian Oil Co.*, 128 La. 886; 55 So. 564; *Saunders v. Busch-Everett Co.*, 138 La. 1049; 71 So. 153.

Unless advance payments be made

on time, the lease is subject to forfeiture. *Brown v. Wilson* (Okla.), 160 Pac. 94; L. R. A. 1917 B 1184.

(a) Forfeiture for failure to pay, section 856.

¹⁰⁷ *McMillan v. Philadelphia Co.*, 159 Pa. St. 142; 28 Atl. Rep. 220; *Barrett v. McAllister*, 33 W. Va. 738; 11 S. E. Rep. 220.

to exercise his option; when he had done that he would be in a position to compel a conveyance. Until he had declared his election, he had a mere license, which was a personal privilege only and not assignable or transmissible. The agreement by its terms was binding on the landowners, "heirs and assigns of the respective parties." The owner sold the land. For twenty years A visited the land and did some prospecting, but nothing more. At the end of ten years the owner sold the land. It was held that A was bound to declare his position towards the owner of the land as soon as it was fairly possible. "Fair dealing," said the court, "required of him to take the requisite steps, under this agreement, within a reasonable time. No time being specified in the instrument, the law affixed to it the obligation of proceeding within what would be deemed a reasonable time." As the owner had a right to revoke the license, and A had failed to declare his position with reference to the land, the court considered the conveyance a revocation of the license.¹⁰⁸ Where the instrument was to run ninety-nine years and was of the "mineral and petroleum interests" in the land, the so-called lessees to pay "one-tenth part of the net profits of whatever may be discovered and worked in and upon said lands deemed admissible to be tested and worked," and the lessees agreed "to commence testing said property within three years' time," it was held that the lessee was under no obligation to commence work unless he deemed it advisable, that there was no consideration for the instrument, and therefore it was void; and that it was a mere option.¹⁰⁹ Where a lease provided if oil or gas were found the lessee should have the refusal for three months of a lease of an adjoining tract, on terms "that may be equal to the best terms offered by any other person or persons therefor," it was held that this option passed with an assignment of the lease, even though the lease was not assignable, the lessor having entered into a new agreement with the assignee, especially providing for a continuance of the covenants of the lease unmodified.¹¹⁰ An option without any consideration for it

¹⁰⁸ *Cahoon v. Bayaud*, 123 N. Y. 298; 25 N. E. Rep. 376. § 863, note 31; § 875, note 90.

¹⁰⁹ *Petroleum Co. v. Coal, etc.*, Co., 89 Tenn. 381; 18 S. W. Rep. 65; *Snodgrass v. South Penn. Oil*

Co., 47 W. Va. 509; 35 S. E. Rep. 820; *Davis v. Riddle*, 25 Colo. App. 162; 136 Pac. Rep. 551.

¹¹⁰ *Guffey v. Clever*, 146 Pa. St. 548; 23 Atl. Rep. 161.

may be withdrawn at any time before its acceptance.¹¹¹ A so-called lease, not binding on the lessee to carry out its covenants, but reserving to him the right to defeat it at any time, and relieve himself from the payment of any consideration for it, is invalid to create any estate except a mere optional right of entry, which can be terminated by either party at his will, and which the death of the lessor does terminate.¹¹² A lease provided that it should become null and void, and all rights under it should cease and determine, unless a well should be completed on the premises within one month from the date thereof, or unless the lessee should pay at the rate of one hundred dollars monthly, in advance, for each additional month such completion was delayed, from the time mentioned for the completion of the well, until a well was completed. It was held that this was a mere option, revocable at the pleasure of the lessee.¹¹³ Where a lease contained a clause that at the end of the term the lessee might have the right to purchase the leased premises, this was held to give the assignee of the lease the right to make the purchase.¹¹⁴ Oil and gas leases and a

¹¹¹ *Snow v. Nelson*, 113 Fed. Rep. 353; *Risch v. Burch* (Ind.), 95 N. E. 123; *Cortelyou v. Barnsdall*, 236 Ill. 138; 86 N. E. Rep. 200; affirming 140 Ill. App. 163.

A contract is not void for mutuality, where it gives the defendant an option to explore the land for gas or oil, if the purchaser does what he agrees to do for the privilege of choosing whether or not he will perform or claim performance of the contract, and for the consideration received the seller parts with his right of choice. *Pittsburg, etc., Brick Co. v. Bailey*, 76 Kan. 42; 90 Pac. Rep. 803; 13 L. R. A. (N. S.) 745.

¹¹² *Trees v. Eclipse Oil Co.*, 47 W. Va. 107; 34 S. E. Rep. 933; *Steelsmith v. Gartlan*, 45 W. Va.

27; 29 S. E. Rep. 978; 44 L. R. A. 107; *Tennessee Oil, etc., Co. v. Brown*, 131 Fed. Rep. 696; 65 C. C. A. 524.

¹¹³ *Glasgow v. Griffith*, 22 Pittsb. L. J. (N. S.) 181. So where he could release himself from his obligation by paying \$5. *Owens v. Corsicana Petroleum Co.* (Tex. Civ. App.), 169 S. W. 192.

¹¹⁴ *Napier v. Darlington*, 70 Pa. St. 64.

Where an instrument showed on its face that the real consideration was the prospecting and developing of the land with due diligence for oil, and was to remain in force only so long as the parties complied with their mutual agreements, it was held that it was at most a mere option which was terminated by the fore-

contract between the parties thereto fixed no term or time for the leases to run, and provided no consideration for the grantor other than an interest in the production where oil was found in paying quantities, and so much per year where gas was found, and nothing in either required the lessees to drill within any designated time, though each lease provided that, if no well was commenced within a year, the grant should become null and void unless the lessees paid the lessor a certain sum for each year thereafter commencement was delayed. It was held that the leases were simply options for a year with the right of renewal on payment of the sum stipulated if the lessees did not begin operation, that there was nothing in either the leases or contract binding the lessee to do anything on which

closure of a judgment lien against the lands. *Hodges v. Brice*, 32 Tex. Civ. App. 358; 74 S. W. Rep. 590.

A lease for mining for oil and gas, which grants to the lessee the right to mine for oil or gas so long as the same is produced and the royalty and rentals are paid, but which does not bind the lessee to perform any obligation, is a mere option, which the lessor may withdraw before the lessee has done some act by which he binds himself to exercise the option. *Cortelyou v. Barnsdall*, 86 N. E. 200; 236 Ill. 138.

The lessor in an oil and gas lease granted to a lessee for the term of three years, and so long thereafter as oil or gas is produced from the land leased and royalty and rentals paid, the exclusive right to mine for and produce petroleum and natural gas of a tract of land described, with the provision that the lessee was to deliver to the lessor one-eighth of all petroleum produced, and to pay \$100 per annum for each gas well on which the gas is marketed, the lease

to be null and void if a well is not commenced within twelve months from the date of the lease unless the lessee shall thereafter pay annually to the lessor twenty-five cents per acre per year for each year's delay in commencing said well, each payment to extend the time for completion for one year. It was held that the lease is a mere option, without any consideration for its execution, and was taken by the lessee solely for speculative purposes, and, there having been no performance on the part of the lessee or his assignees before it was revoked by the lessors, that the lessors have the lawful right to revoke the option. *Cortelyou v. Barnsdall*, 140 Ill. App. 163.

An oil and gas lease providing for exploitation or exploration may be valid notwithstanding its provisions are to a large extent optional with respect to what the lessees shall do. *Ulrey v. Poe*, 134 Ill. App. 298, judgment affirmed *Poe v. Ulrey* (1908), 84 N. E. 46; 233 Ill. 56.

the lessor could sue for specific performance, and they were void for want of mutuality.^{114a}

§ 77. Options continued.

As a rule time is of the essence of an option, as is well illustrated by an agreement providing that the prospective purchaser should "have the refusal ten days from date;" and it was held that the purchaser must exercise his option within that time by a declaration of an intention to purchase, although it was not necessary to complete the purchase within that time.¹¹⁵ In speaking of options on oil or gas lands, the Supreme Court of the United States used this language: "The fluctuating character and value of this character of property is remarkably illustrated in the history of the production of mineral oil from wells. Property worth thousands today is worth nothing tomorrow; and that which we today sell for a thousand dollars as its fair value, may by the natural changes of a week, or the energy and courage of desperate enterprise, in the same time, be made to yield that much every day. The injustice, therefore, is obvious of permitting one holding the right to assert an ownership in such property to voluntarily await the

^{114a} Young v. McIlhenny (Ky.), 116 S. W. Rep. 728; Jennings-Heywood Syndicate v. Houssiere-Latrille Oil Co., 119 La. 793; 44 So. Rep. 481; O'Neill v. Risinger, 77 Kan. 63; 93 Pac. Rep. 340; Brewster v. Lanyon Zinc Co., 140 Fed. Rep. 801; 72 C. C. A. 213; Pittsburg, etc., Brick Co. v. Bailey, 76 Kan. 42; 90 Pac. Rep. 803; 13 L. R. A. (N. S.) 745.

According to the last Oklahoma decision a lease giving the lessee the right to surrender it also gives the lessor the right to refuse to accept rent for an extension of the lease, even though the lease provides for such payments and an ex-

tension of the lease. Hill Oil & Gas Co. v. ——— (Okla.), 157 Pac. 710; Brown v. Wilson (Okla.), 160 Pac. 94; L. R. A. 1917 B 1154. Commented on as well as prior Oklahoma decisions in Shaffer v. Marks, 241 Fed. 139. But he cannot revoke it during the period, according to these decisions, for which he has accepted payment for the extension period. These recent cases run counter to prior Oklahoma cases (in effect), and also the general trend of decisions. See Sec. 72, notes.

¹¹⁵ Smith's Appeal, 69 Pa. St. 474. See Flynn v. White Breast Coal Co., 72 Ia. 738; 32 N. W. Rep. 471.

event, and then decide, when the danger which is over had been at the risk of another, to come in and share the profit. While a much longer time might be allowed to assert this right in regard to real estate whose value is fixed, on which no outlay is made for improvement, and but little change in value, the class of property here considered, subject to the most rapid, frequent and violent fluctuations in value of anything known as property, requires prompt action in all who hold an option, whether they will share its risks or stand clear of them."¹¹⁶ One who purchases land, with knowledge that another holds an option upon it, takes it subject to the right of the person holding such option, and he holds it in trust for him. The person having the option may follow the land and compel such purchaser to execute to him a lease or a deed of conveyance, as the option may provide; or he may, in case of an option to purchase, compel the original owner to pay him what he had agreed to take for the land, and have a decree to sell it in order to satisfy his claim. Of course, both the original owner and purchaser are necessary parties to the suit.¹¹⁷ Where lands and the oil and gas in it were let, demised and granted for the purpose and with the exclusive right to drill and operate for oil and gas for five years, and as much longer as oil and gas should be found in paying quantities, the consideration being one dollar and a promise to pay certain rentals for further delay if default should be made in drilling a test well within a year; and there was a provision in the lease that a failure to drill the well or pay the rent should render it void both as to lessor and lessee, it was held this was more than an option or license, being a lease of the land, oil and

¹¹⁶ *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587. See *Johnston v. Standard Mining Co.*, 148 U. S. 360; 13 Sup. Ct. Rep. 585; *Hoyt v. Latham*, 143 U. S. 553; 12 Sup. Ct. Rep. 568; *Hammond v. Hopkins*, 143

U. S. 224; *Felix v. Patrick*, 145 U. S. 317; 12 Sup. Ct. Rep. 862.

¹¹⁷ *Barrett v. McAllister*, 33 W. Va. 738; 11 S. E. Rep. 220. See *Weaver v. Burr*, 31 W. Va. 736; 8 S. E. Rep. 743.

gas for the time and purposes specified.¹¹⁸ An instrument was termed an "Oil and Gas Lease." It recited that in consideration of one dollar and of covenants the lessor leased certain described lands, with the exclusive right of drilling and operating for oil and gas for five years, and providing for the lessor having a certain proportion of any oil and gas found and if "should no well be drilled . . . within two years . . . said lessee" should "pay to the lessor twenty-five cents per acre annually at the end of each year or forfeit" the lease. This was held to be only an option to explore for oil and gas, and void if no well was drilled in two years and no rental paid thereafter.^{118a}

¹¹⁸ Woodland Oil Co. v. Crawford, 55 Ohio St. 161; 44 N. E. Rep. 1093; 34 L. R. A. 62; Pittsburg, etc., Brick Co. v. Bailey, 76 Kan. 42; 90 Pac. Rep. 803. See Monfort v. Lanyon Zinc Co., 67 Kan. 128; 72 Pac. Rep. 784.

A nominal consideration will not prevent a so-called lease being considered an option. Eclipse Oil Co. v. South Penn. Oil Co., 47 W. Va. 107; 34 S. E. Rep. 923.

"Contracts unperformed, optional as to one of the parties, are optional as to both." Steelsmith v. Gartlan, 45 W. Va. 27; 29 S. E. Rep. 978; 44 L. R. A. 107; Brewster v. Lanyon Zinc Co., 140 Fed. 801; 72 C. C. A. 213. See Presidio Mining Co. v. Bellis, 68 Tex. 581; 4 S. W. Rep. 860.

In one case it was held that a provision for payment for delay in commencing the well required payment only at reasonable intervals and not to entitle the lessor to a cancellation for a ninety day delay without payment. Smith v. Steele, 96 Kansas 106, 150 Pac. 519.

If payments be not made at the time agreed upon, the lessor may cancel the lease. Mitchell v. Probst

(Okl.), 152 Pac. 597; Cohn v. Clark (Okl.), 150 Pac. 457; Lamar v. Farmer (Ind. App.), 109 N. E. 791; Brown v. Wilson (Okl.), 160 Pac. 94; L. R. A. 1917 B 1184.

Delay rentals paid by the lessee do not bar a recovery for breach of other independent covenants. Heffner v. Light, etc., Co. (W. Va.), 87 S. E. 206.

A lease providing for a forfeiture on failure to commence a well in ninety days unless the lessee pay for delay 41 cents per acre per year is not void for uncertainty as to the time of payment of rental. Bloom v. Pugh, 98 Kan. 589; 160 Pac. 1135.

An agreement for compensation for total failure to operate is a covenant independent from those providing for payments for periodic postponements. Heffner v. Light, etc., Co. (W. Va.), 87 S. E. 206.

"Unless lease." Such leases are known as unless leases. Shaffer v. Marks, 241 Fed. 139.

^{118a} Mortin v. Drosten (Mo. App.), 185 S. W. 733.

An option in a lease for a cash consideration to drill a well on the premises within three months, with privilege of renewal from quar-

§ 78. Option to pay rent or drill well.(a)

As a rule a lessee cannot exercise an option concerning the development or working of the premises to avoid the obligation of a lease. This was well illustrated by a case in which the lessee was to pay a monthly rental until a well was completed, and for a failure to complete the well or pay the rental the lease was to be absolutely null and void. It was held that the fact that the lessee had the option to drill the well or not, or pay the rental or not, simply gave him the right merely to elect to drill the well or to pay the rental, and not to elect to do neither

ter to quarter for five years is valid. *Leonard v. Busch-Everett Co.*, 139 La. 1099, 72 So. 749.

An option to purchase mining properties provided that if the purchaser failed to notify the seller by a certain date in writing of his intention to exercise the option, the sum paid should be assumed by the seller giving his notes therefor. It was held that no notice of an intention not to exercise the option was required, and such option was defeated automatically on the date named, if there was no notice regardless of whether it was treated as a bare option or a grant on condition subsequent. *Breiting v. Calhoun*, 158 N. Y. Sup. 46.

Where an oil and gas lease was made, executed, and delivered for the consideration of \$1 in hand paid the lessor, and the covenants and agreements hereinafter contained on the part of the lessee, and leased and let to him a certain tract of land for a term of ten years and as long thereafter as oil and gas or either were produced therefrom by the lessee, he to yield to the lessor certain royalties from the oil and gas produced, and where the lessee agreed to complete a well on the premises within four months from

the date thereof or pay at the rate of \$80 in advance for each three months such completion was delayed; it was held, that the \$1 supported the four months' period in which the lessee had to complete a well and supported no other stipulation in the lease; that the prospective royalties were the sole consideration for the execution of the lease on the part of the lessor; that the agreements on the part of the lessee to complete a well on the demised premises within four months or pay for delay conferred an option on the lessee to drill or pay; and that a failure to do either forfeited the lease at the option of the lessor, who thereafter was entitled to have the same judicially declared forfeited and canceled as a cloud upon his title. *Brown v. Wilson* (Okl.), 160 Pac. 94; L. R. A. 1917 B 1184.

This decision and a decision in *Hill Oil & Gas Co. v. ———* (Okl.), 157 Pac. 710, sounds a new note in the law of forfeiture, and it is not supported by prior Oklahoma cases, in fact, in effect, overrules them. See *Shaffer v. Marks*, 241 Fed. 139, for comment on the Oklahoma cases.

(a) Forfeiture, §64.

and merely suffer a forfeiture of the lease.¹¹⁹ Where the instrument executed by the owner of the land and other persons granted all the oil and gas on the land described, to be paid for by a royalty named, operations to be commenced within two years or the instrument to be void; but a forfeiture might be averted from year to year thereafter by paying one hundred dollars in advance; it was held that the contract could not be regarded as a sale, to be defeated on condition subsequent, for the reason that the real consideration was for the development of the property; and as no definite time was fixed for its development, and it being requisite to an option that there be some time for performance, the owner might rescind the contract, in the absence of any equities owing to any work having been begun by such other persons.¹²⁰

§ 79. Appurtenances, what will pass as such—Surface.

"A conveyance of one acre of land can never be made, by legal construction, to carry another acre by way of incident or appurtenant to the first."¹²¹ Nor can one tract be so appurtenant to another as to carry the latter with it in case it is conveyed.¹²² A deed conveying land and "all appurtenances" conveys incorporeal and not corporeal rights.¹²³ A grant of a right to drill for oil and gas in a certain tract carries with it, as appurtenant thereto, a right of ingress and egress, and space enough to operate, to store oil, and necessary pipe lines to carry away the oil and gas.¹²⁴

¹¹⁹ *Jackson v. O'Hara*, 183 Pa. St. 233; 38 Atl. Rep. 624. But see *Monfort v. Lanyon Zinc Co.*, 67 Kan. 310; 72 Pac. Rep. 784.

Where the obligation on the part of the lessee was either to exploit the land for oil, or else to pay \$50 in advance quarterly, on failure to make the quarterly payments the only offer of performance, it was held the lessee could make was to develop the land for oil. *Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co.*, 119 La. 793; 44 So. Rep. 481.

¹²⁰ *National Oil and Pipe Line Co. v. Teel* (Tex. Civ. App.), 67 S. W. Rep. 545.

¹²¹ *Child v. Starr*, 4 Hill 369; *Trustees of School v. Schroll*, 120 Ill. 509; 12 N. E. Rep. 243; *Ogden v. Jennings*, 62 N. Y. 526.

¹²² *Humphreys v. McKissock*, 140 U. S. 304; 11 Sup. Ct. Rep. 779; *Grover v. Howard*, 31 Me. 546.

¹²³ *Hofer's Appeal*, 116 Pa. St. 360; 9 Atl. Rep. 441.

¹²⁴ *Dietz v. Mission Transfer Co.*, 95 Cal. 92; 30 Pac. Rep. 380; *Pulaski Oil Co. v. Conner* (Okla.), 162

§ 80. Statute of Frauds.

A few decisions may be stated involving the Statute of Frauds without a discussion of any particular rule. Thus a lessor may by parol release the lessee from the payment of a royalty or rent.¹²⁵ A parol agreement between a lessee and a well driller, to put down a well, for an interest in the oil obtained is valid.¹²⁶ So is parol agreement between landowners not to drill within a certain distance of the boundary line between their respective tracts of land;¹²⁷ and likewise a parol agreement to locate a mine and share the expense of locating and developing it;¹²⁸ or that a mine should be worked on the shares.¹²⁹ An oral agreement to deliver a certain share of oil to be produced from land, when put in a tank, is an agreement to give an interest in land, and is within the statute.¹³⁰ Where land was rented verbally, and after entry by the tenant the landlord stated that as long as the tenant paid her rent she could have the place; it was held that the contract was not obnoxious to the Statute of Fraud.^{130a}

Pac. 464; *Francis v. West Virginia Oil Co.* (Cal.), 162 Pac. 394; *Collison v. Philadelphia Oil Co.*, 233 Pa. 350; 82 Atl. 474.

A grant of a lower vein of coal carries with it, as appurtenant thereto, the right to pass through the upper vein. *Chartiers Block Coal Co. v. Mellon*, 152 Pa. St. 286; 25 Atl. Rep. 597; 18 L. R. A. 702.

A side track, used in operating a mine, passes with a lease of the mine, as appurtenant thereto. *Consolidated Coal Co. v. Savitz*, 57 Ill. App. 659.

¹²⁵ *Crawford v. Bellvere, etc.*, Gas Co., 183 Pa. St. 227; 38 Atl. Rep. 595; *Nilson v. Goldstein*, 152 Pa. St. 493; 25 Atl. Rep. 493.

¹²⁶ *Haight v. Connors*, Pa. St., 24 Atl. Rep. 302.

¹²⁷ *Ware v. Longmade*, 9 Ohio C. Ct. Rep. 85.

¹²⁸ *Moritz v. Lovelle*, 77 Cal. 10; 18 Pac. Rep. 803.

¹²⁹ *Hudepohl v. Libert, etc., Co.*, 80 Cal. 553; 22 Pac. Rep. 339.

¹³⁰ *Lithgow v. Shook*, 39 Ohio Wkly. L. Bull. 39. See *Heller v. Dailey*, 28 Ind. App. 555; 63 N. E. Rep. 490.

^{130a} *Hamlett v. Coates* (Tex. Civ. App.), 182 S. W. 1144.

An oil and gas lease, giving to the lessee the right to explore lands and remove therefrom the oil and gas, is a contract for the transfer and sale of an interest in lands, and must be in writing. *Beckett-Isleman Oil Co. v. Backer*, 155 Ky. 818; 178 S. W. 1084; *Cline v. Guaranty Oil Co.*, 167 Cal. 476; 140 Pac. 1; *Osborn v. Arkansas, etc., Gas Co.*, 103 Ark. 175; 146 S. W. 122.

In New York while the right to operate for oil under a lease or contract is personal property, by virtue of General Construction Law, Sec. 39, yet the perpetual exclusive right to operate cannot be created, except as provided by the Real Property Laws Act, Sec. 259. *DeHart v. Enright*, 93 N. Y. Misc.

If a lease must be in writing its assignment must also be in writing.^{130b}

§ 81. Description of leased premises.

Parol evidence is not admissible to vary a definite description contained in a lease, or to show that it was the intention to cover another tract.¹³¹ "In the description of real estate in a written instrument the land must be so far described that it may be identified without resort to parol evidence. In such cases, if an officer is unable to locate the land without the exercise of an arbitrary discretion, the description is insufficient." In the case from which this quotation is made the lease was of "one tract of land, each twenty feet square of the following real estate, to wit: All that part of W. $\frac{1}{2}$, N. E. $\frac{1}{4}$, Sec. 24, town 23 north, range 5 east, which lies south and west of Wild Cat Creek, containing in all thirty-two acres, one of said twenty-foot tracts being eight rods south and fifteen east of northwest corner of the above described tract." It was held that this description was void for insufficiency, even admitting that the word "rods" should be supplied after the word "fifteen;" for it was manifest that every part of the square could not be eight rods south and fifteen rods east of the northwest corner of the whole tract; and the description failed to state what part of it is so situated.¹³² But a lease of a large tract, only a part of it to be operated, which part the lessor is to designate, is not void; and the lessor may sue on the covenants of the lease, although he has not designated the part to be occupied by the lessee because he refused to allow him to do so, if he has been ready to point them out to such lessee, and so avers in his complaint.¹³³ A description in a lease of a tract of land twenty

Rep. 213; 157 N. Y. Supp. Rep. 46. In the same state, an oral agreement to adopt a term of a farming lease of a life estate after its termination by the death of the lessor, is insufficient under the express provision of Real Property Law, Sec. 242. *Nesbitt v. Thompson*, 93 N. Y. Misc. Rep. 251; 157 N. Y. Supp. Rep. 251.

^{130b} *Beckett v. Iseman Oil Co.*, 165 Ky. 818; 178 S. W. 1084.

¹³¹ *Duffield v. Hue*, 129 Pa. St. 94; 18 Atl. Rep. 566.

¹³² *Diamond Plate Glass Co. v. Tennell*, 22 Ind. App. 132; 52 N. E. Rep. 168.

¹³³ *Indianapolis Natural Gas Co. v. Spaulgh*, 17 Ind. App. 683; 46 N. E. Rep. 691. See *Stahl v. Van Vleck*,

feet square "situated at the southeast corner of the north half of the southwest quarter" of a certain quarter section of land sufficiently describes the tract granted.¹³⁴ The owner of three forty-acre and adjoining tracts leased one acre, to be selected by himself; and in the lease it was "agreed on the part of the first part that if oil or gas be obtained by the second party or assigns . . . upon said tract, or on lands adjoining the same premises of which the foregoing one acre described embraces a part, said second party shall have the right to operate acres of the balance of said premises on the same terms as above." It was held that the forty-acre tract in which the one acre, after the lease had been executed, had been selected by the lessor, was the forty acres to be operated under the contract.¹³⁵

53 Ohio St. 136; 41 N. E. Rep. 35; *Lingeman v. Shirk*, 15 Ind. App. 432; 43 N. E. Rep. 33; *Cheney v. Cook*, 7 Wis. 357; *Washburn v. Fletcher*, 42 Wis. 152; *Roehl v. Haumesser*, 114 Ind. 311; 15 N. E. Rep. 345.

¹³⁴ *Simpson v. Pittsburgh, etc., Co.*, 28 Ind. App. 343; 62 N. E. Rep. 753.

¹³⁵ *Stahl v. Van Vleck*, 53 Ohio St. 136; 41 N. E. Rep. 35.

Where a grant of a right to operate for oil required the grantees to complete a well every ninety days from the completion of the first well, if it proved to be a paying well; or surrender the lease, excepting ten acres for each paying well, the grantees were held bound, after the first well proved to be a paying well, either to continue to drill wells, as provided, or themselves to select tracts of ten acres each appurtenant to each well drilled. *Monaghan v. Mount*, 36 Ind. App. 188; 74 N. E. Rep. 579.

Where the owner of three adjoining forty-acre tracts leases one acre to be designated by him, agreeing that, if oil or gas be obtained under

the lease or on lands adjoining the same premises of which the foregoing acre is a part, lessee shall have the right to operate forty acres of the balance of such premises on the terms before stated, the forty-acre tract out of which the first acre was designated constitutes the forty acres to be drilled under the contract. *Stahl v. Van Vleck*, 30 Ohio Cir. Ct. R. 755.

The owner of a tract of land comprising sixty acres executed a lease granting the oil and gas under the land "bounded and described as follows, to-wit: North by lands of Ohio river, east by land of Mrs. T. P. Pollock, south by lands of W. M. Irwin, west by lands of Mrs. J. C. Sharp, containing thirty acres," and also giving the lessee the refusal of the lessor's thirty acres reserved, which right of option, however, the lessee never exercised. It was held, that the lease was void for uncertainty; it being impossible to determine from the description therein what part of the tract was intended. *South Penn. Oil Co. v. Calf Creek Oil & Gas Co.*, 140 F. 507.

Where a contract granting the

§ 82. Right of lessor to use surface—Lessee's right of possession.

A lease of a tract of land for oil or gas purposes does not necessarily exclude the lessor from using or cultivating its surface, if he does not interfere with the operations of the lessee. Usually the lessee is given possession of so much of the surface surrounding the well or wells, with ingress and egress, as will enable him to drill and operate them, with a right to storage and ways to lay pipe lines; and the remainder of the surface is reserved for the use of the lessor. Or the lessee may be re-

right to drill for oil and gas on plaintiff's land required the grantees to complete a well in every period of ninety days from the completion of the first paying well, or to surrender lease, excepting ten acres for each paying well, but the contract did not further describe such *ten-acre tracts* to be excepted out of the one hundred acres covered by the lease, plaintiff, on a breach of the contract by the defendants, was not entitled to arbitrarily set off such separate parcels, and have his title quieted as to the balance. *Monaghan v. Mount, supra*.

If two descriptions in a lease are inconsistent, one describing the land leased as bounded "substantially" by certain named adjoining land-owners, and the others by a reference to a previous deed to the lessor, describing it by definite lines, the latter will prevail. *Coffindaffer v. Hope Natural Gas Co.*, 74 W. Va. 57; 81 S. E. 966; 52 L. R. A. (N. S.) 473.

An oil lease described the premises as 30 acres of land, being the unsold part of the J 50-acre tract. It provided that if the lessees became interested in any adjoining land, and drilled a well or wells within 250 feet of the 30 acres leased, they should drill a well on

the leased land adjacent to the well drilled on the adjoining land. It was held that the lease only covered a single tract of 30 acres, and did not include a strip of adjoining land erroneously excluded from a prior conveyance to others. *Gilmore v. O'Neil* (Tex. Civ. App.), 139 S. W. 1162.

Where a lease of oil land contained an ambiguity as to whether it was limited to a single 30-acre tract, or included any and all unsold portions of a 50-acre tract, it was held that parol evidence was admissible to explain the ambiguity. *Gilmore v. O'Neil* (Tex. Civ. App.), 139 S. W. 1162.

Where, in a suit by a senior lessee of oil and gas in a tract of 340 acres to cancel a junior lease made by the same lessor on 45½ acres within the bounds of the former lease, the bill was dismissed on demurrer for indefinite description of the tract leased, and the lessor was the owner of all the minerals in 411 acres of ground and 45 acres of the surface, it cannot be determined from the bill that the boundaries of the lease were uncertain, and a demurrer should have been overruled. *South Penn. Oil Co. v. Gardner Oil & Gas Co.*, 74 W. Va. 403; 82 S. E. 203.

stricted in his operations to a certain described tract carved out of a larger tract, although the right to take the oil or gas under such larger tract is unqualifiedly given him. An instance of this kind came before the Supreme Court of the United States. An owner of forty acres gave a lease on it "for the sole and only purpose of boring, mining, and excavating for petroleum or carbon oil and gas, and piping of oil and gas," "excepting reserved therefrom ten acres," for two years, or as long as gas should be found in paying quantities. He was to receive one-eighth of the oil produced, and two hundred dollars per annum for each gas well drilled. The lessor reserved the right to "fully use and enjoy the said premises for the purpose of tillage, except such parts as may be necessary for said mining purposes, and a right of way to and from the place or places of said mining or excavating." In construing the lease, the court said: "The subject of the grant was not the lands, certainly not the surface. All of that, except the portions actually necessary for operating purposes and the easement of ingress and egress, was expressly reserved to Taylor. The real subject of the grant was the gas and oil contained in or obtainable from the land, or rather the right to take possession of the gas and oil by mining and boring for the same." Of course, the lease gave all the oil and gas under the entire forty acres.¹³⁶ In another case, where the lease specified that no wells were to be drilled within three hundred yards of a certain building on the leased tract, and the lessor had undertaken to lease this three hundred yards to a third party, the court said: "The well which respondent proposes to bore is within this prohibited distance; and the respondents claim that Brown, and they as his lessees, have the right to drill wells within that part of the territory. But the clause in question is neither a reservation nor an exception as to the land, but a limitation as to the privilege granted. It does not, in any way diminish the area of the land leased—that is still the whole tract; but it restricts the operations of the lessees in putting down wells to the portion outside of the prohibited distance. For right of way and other purposes of the lease, excepting the location of wells, the space inside the stipulated line is as much leased to the lessee as any

¹³⁶ *Brown v. Spillman*, 155 U. S. 455, 15 Sup. Ct. Rep. 245; reversing 45 Fed. Rep. 291. See § 119.

other part of the tract. The terms of the grant would imply the reservation to the lessor of the possession of the soil for purposes other than those granted to the lessee, and the parties have expressed what otherwise would have been implied by the provision that the lessor is to fully use and enjoy the said premises for the purpose of tillage, except such part as shall be necessary for said operating purposes."¹³⁷ The lessee has the right to occupy enough of the surface of the tract leased as will enable him to drill and operate enough wells to develop the land leased.^{137a} The term "cultivated enclosure" in an oil lease which prohibits boring wells for oil or gas on such enclosure includes those bored after as well as those in existence at the date of the lease.^{137b} An enclosure in such an instance which contains both cultivated and uncultivated tracts is a "cultivated enclosure," but the lessee may bore on the uncultivated tract, if he do not interfere with the use of the cultivated part. And if a tract be uncultivated which is covered by the lease, he who first by an open act in good faith subjects the tract to his use has the superior right to it.^{137c} Where a lease did not contain a covenant especially providing that the lessee should be liable for damages to crops, fruit trees or other surface rights of the landowner, it was held that the lessee was liable for their destruction unless, under a plea, he showed that the damages to them were necessarily incident to the operations authorized by the contract in the lease, unless the charge in the complaint was that the damages arose from the negligence of the lessee. "While an oil and gas lease carries with it implications, if not within its expression, such rights as to the surface as may be necessarily incident to the performance of the object of the contract, yet it is well settled that the implications go no further, and that the holder of a mining lease or oil and gas lease must protect the surface of the ground in so far as such incident necessity does not exist."^{137d}

¹³⁷ *Westmoreland, etc., Co. v. DeWitt*, 130 Pa. St. 235; 18 Atl. Rep. 724; 29 Amer. L. Reg. 93; 5 L. R. A. 731. See *Funk v. Haldeman*, 53 Pa. St. 229; *Barker v. Dale*, 3 Pittsb. 190.

^{137a} *Barnsdoll Oil Co. v. Lehy*, 195 Fed. 731.

The lessee has the right to oc-

cupy enough territory to enable him to drill and operate a well or the necessary wells. *Wardell v. Watson*, 93 Mo. 107; 5 S. W. Rep. 605.

^{137b} *Barnsdoll Oil Co. v. Lehy*, 195 Fed. 731.

^{137c} *Barnsdoll Oil Co. v. Lehy*, 195 Fed. 731.

^{137d} *Pulaski Oil Co. v. Conner*

Where the lease merely gave the lessee such land as was necessary to drill and operate wells, it was held that the lessee could not show an understanding that for each well open he should be entitled to an acre of land.^{137e} A person with a right to go on another's land to bore and develop it for oil and gas, with the usual right therefore, has the right to build a road over the land, when necessary to haul machinery and material of drilling a well.^{137f}

(Okl.), 162 Pac. 464; citing Gulf Pipe Line Co. v. Pawnee-Tulsa Petroleum Co., 34 Okl. 775; 127 Pac. 252; 41 L. R. A. (N. S.) 1108.

^{137e} Moore v. Decker (Tex. Civ. App.), 176 S. W. 816.

^{137f} Coffindaffer v. Hope, etc., Co., 74 W. Va. 57; 81 S. E. 966; 52 L. R. A. (N. S.) 473.

Where defendant disclaim any intention of interfering with the plaintiff's rights in wells opened, and the plaintiff made no effort to have the jury determine how much land was necessary for his operations, he cannot complain of a judgment which merely awarded so much land as was necessary. Moore v. Decker (Tex. Civ. App.), 176 S. W. 816; Pulaski Oil Co. v. Conner (Okl.), 162 Pac. 464; Francis v. West Virginia Oil Co. (Cal.), 162 Pac. 394.

The doctrine that the owner of lands has no property right in oil and gas beneath the surface until he has reduced it to possession does not deny, but concedes to, him the exclusive right to use the surface to reduce the oil and gas to possession. Strother v. Mangham, 138 La. 437, 70 So. 425.

The owners right to use the surface is subject to the control of the state in the exercise of its police power. Strother v. Mangham, 138 La. 437; 70 So. 425.

A lease to mine and occupy so

much of the land as may be necessary does not give the lessee any right to occupy any part of the land for residences for his employees. Fowler v. Delaplain, 79 Ohio St. 279; 87 N. E. Rep. 260.

In order to establish the existence of a custom in an oil-producing country permitting a lessee under an oil lease to erect on the land described in the lease a *dwelling for the occupancy of his employees*, it must be shown what oil-producing countries are meant, the time when the custom began, and to whom and where such custom was known, and whether it was known to the parties at the date of the lease. Prigg v. Preston, 28 Pa. Super Ct. 272.

A lease for the purpose of mining phosphates and phosphatic deposits provided for the building of railroads, together with the right to *cut and use the timber on the land* for the construction of the superstructure of such tramways, and to use fuel necessary for the machinery and employees of the lessee, including fuel necessary for washing rock. It was held not to give the right to use timber to build houses for employees, to be left under the lease on the land, though by the use of coal the use of wood for fuel had been much reduced. Lewis v. Virginia-Carolina Chemical Co., 48 S. E. 280; 69 S. C. 364.

The word "surface" used in an

§ 83. Construction.

In a celebrated oil case it was said with reference to the rule to be applied to the construction of oil leases that "Such leases are construed most strictly against the lessee, and favorable to the lessor."¹³⁸ "When a lease provides the mode, manner, and character of search to be made, implications in regard thereto are excluded thereby as repugnant. And the demise for the purpose of operating for oil and gas for the period of five years is dependent upon the discovery of oil and gas in the search provided for, if such search is unsuccessful, the demise fails therewith, as such discovery is a condition precedent to the continuance or vesting of the demise."^{138a} The lessee's title being inchoate and contingent, both as to the five-year limit and time thereafter, on the finding of oil and gas in paying quantities, did not become vested by reason of his putting down a non-productive well. This gave him no new or more extensive rights than he enjoyed before, but in fact destroyed all his rights under the lease."¹³⁹

oil lease means that portion of the land which is or may be used for agricultural purposes. *Williams v. South Penn. Oil Co.*, 52 W. Va. 181; 43 S. E. Rep. 214.

In the absence of a contrary expression in the lease, the lessee has only such rights to the surface of the land as may be necessarily incident to the exercise of his rights under the lease, and must *protect the surface rights* in so far as such incident necessity does not exist. *Pulaski Oil Co. v. Conner (Okl.)*, 162 Pac. 464; *Gulf Pipe Line Co. v. Pawnee-Tulsa Petroleum Co.*, 34 Okl. 775; 127 Pac. 252; 41 L. R. A. (N. S.) 1108.

A contract to sell oil provided that the purchaser should not remove any pipe or casing in any well drilled on the property and that, in the event of a forfeiture of the right to purchase, the casings and derricks should revert to the vendor and that it should not annul a pre-

vious contract between the vendor and the purchasers' assignor, but that the purchaser should hold and acquire the lands under that contract. It was held that by implication the purchaser was given the right to possession under the contract, though there was no express permission therefore. *Francis v. W. Va. Oil Co. (Cal.)*, 162 Pac. 394.

¹³⁸ Citing *Bettman v. Harness*, 42 W. Va. 433; 21 S. E. Rep. 271; 36 L. R. A. 566; *Parish Fork Oil Co. v. Bridgewater Gas Co.*, 51 W. Va. 583; 42 S. E. Rep. 655; 59 L. R. A. 566.

^{138a} This sentence is quoted in *Paraffine Oil Co. v. Cruce (Okl.)*, 162 Pac. 716; *Steelsmith v. Gartlan*, 45 W. Va. 27, 29 S. E. 978; 44 L. R. A. 107.

¹³⁹ *Steelsmith v. Gartlan*, 45 W. Va. 27; 29 S. E. Rep. 978; 44 L. R. A. 107; *Superior Oil & Gas Co. v. Mehlin (Okl.)*, 108 Pac. Rep. 545.

An oil lease will be so construed

"Generally, it is the lessee who is favored, and, after a substantial compliance by him with the terms of the contract, equity will not regard a technical breach. But, with mining leases, it is otherwise. This is due principally, if not entirely, to the nature of the business of mining, and, more specifically, oil mining; to the temptation offered the shrewd operator to purchase at a nominal price the right of developing the lands, the owner of which is ignorant of their real value for any purpose, and then to hold them indefinitely, should it suit his purpose, neither working them himself nor permitting another to do so. Of course, it may be said, in a general way, that parties may make any contract which they desire, and, if a lessor should by way of lease make his intention clear to grant the oil and gas rights upon his property for an inadequate consideration, the courts will enforce it. But the lessee, where the instrument presents a semblance of inequality or unfairness, will find that he has a thorny road to travel before reaching a judicial establishment of his claims. And, in the case supposed, the mere fact that the instrument would seem to contemplate the equivalent of an absolute gift of valuable rights would at once arouse the suspicion of a chancellor, which, if not dispelled by the clearest proof, would lead to its prompt reforming or setting aside upon the application of the proper parties."¹⁴⁰ A lease must be construed as a whole.¹⁴¹ Thus

as to promote development and prevent delay and unproductiveness. *Parish Fork Oil Co. v. Bridgewater Gas Co.*, 51 W. Va. 583; 42 S. E. Rep. 655; 59 L. R. A. 566; *Stahl v. Illinois Oil Co.*, 45 Ind. App. 211; 90 N. E. Rep. 632; *New American Oil & M. Co. v. Troyer*, 166 Ind. 402; 76 N. E. Rep. 253; 77 N. E. Rep. 739; *New American Oil & M. Co. v. Wolff*, 166 Ind. 402; 76 N. E. Rep. 255; *Paraffine Oil Co. v. Cruce* (Okla.), 152 Pac. 716; *Hiller v. Ray*, 59 Florida, 285; 52 So. 269; 20 Ann. Cas. 1165; *Superior Oil and Gas Co. v. Nehlin*, 25 Okl. 809; 108 Pac. 545; 138 Am. St. 942.

If the parties act upon interlineations improperly made, the construction they thus put upon the lease

will be adopted by the courts. *Barnsdall v. Boley*, 119 Fed. Rep. 191.

¹⁴⁰ *Bryan on Petroleum*, p. 146, quoted in *Huggins v. Daley*, 99 Fed. Rep. 606; 40 C. C. A. 12; 48 L. R. A. 320; *Rives v. Gulf Refining Co.*, 133 La. 178; 62 So. 623; *Superior Oil Co. v. Nehlin*, 25 Okl. 809; 108 Pac. 545; 138 Am. St. 942; *Petroleum Co. v. Coal, etc., Co.*, 89 Tenn. 381; 18 S. W. 65; *Frank Oil Co. v. Belleview Gas Co.*, 29 Okl. 719; 119 Pac. 260; 43 L. R. A. (N. S.) 487; *Chandler v. Hart*, 161 Cal. 405; 119 Pac. 516; *Barnsdall Oil Co. v. Leahy*, 195 Fed. 731.

A surrender clause is strictly construed. *Shaffer v. Marks*, 241 Fed. 139.

¹⁴¹ *Steelsmith v. Gartlan*, *supra*.

the consideration of a lease having a granting clause, a *habendum* clause, a condition subsequent, and a surrender clause, applies to the whole lease and to each clause of it.*¹⁴¹

§ 84. Construction of instrument by parties.

In cases where the parties have put a construction upon an instrument, especially in instances of doubt, that construction will be applied to the instrument by the courts in litigation arising between them over the subject-matter of the instrument.^{141a} Thus where a lease had been treated by both parties

*¹⁴¹ *Brown v. Fowler*, 65 Ohio St. 507; 63 N. E. Rep. 76.

Where the language of the lease was as much that of the lessee as that of the lessor, the lease was construed most strongly against the lessee, so as to promote development and prevent delay and unproductiveness looking to all parts of the instrument in the light of the facts contained in the record. *Paraffine Oil Co. v. Cruce* (Okla.), 162 Pac. 716.

Where an instrument was entered into which recognized a former lease and bound the lessor to accept \$75 per quarter in lieu of drilling wells, it was held that this contract must be read with the lease as parts of one contract, and if the provisions were inconsistent, those of the agreement must control. *Wilson v. Reserve Gas Co.* (W. Va.), 88 S. E. 1075.

^{141a} Restrictions and prohibitions in the use of real property are not favored by law, and the terms of such covenants will not be enlarged by implication, but confined to their accepted usage and the intention of the parties. *Test Oil Co. v. La Tourelte*, 19 Okla. 214; 91 Pac. Rep. 1025.

If the intention of the parties

be clearly expressed in a covenant to prohibit the drilling of oil and gas wells on a certain tract in all deeds for the conveyance of any and all portions thereof, it will not be enlarged by implication to include the prohibition in a lease on such tract. *Test Oil Co. v. La Tourelte* 19 Okla. 214; 91 Pac. Rep. 1025.

A provision giving the lessee the exclusive right not only to drill for, but to produce, oil on the leased premises, is construed to apply only to wells drilled in the future. *Doddridge County Oil & Gas Co. v. Smity*, 154 Fed. Rep. 970.

"Owing to the differences of the covenants in the various leases, the courts have usually rested their decisions upon the facts of the particular case, endeavoring to determine the intention of the parties from the language used in the instrument as a whole." *Hiller v. Walter Ray & Co.*, 59 Fla. 285; 52 So. 623; 20 Ann. Cas. 1165 (quoted in *Paraffine Oil Co. v. Cruce* (Okla.), 162 Pac. 716); *Petroleum Co. v. Coal, etc., Co.*, 89 Tenn. 381; 18 S. W. 65.

When its terms will permit it under the rules of law, an oil lease will be so construed as to promote development and prevent delay and unproductiveness. *Parish Fork Oil*

to it as a lease at will, in an action by the lessor to rescind, brought sixteen months after its commencement, the court held that the lessee was entitled to recover whatever his advancement exceeded the amount of the royalties on the ore taken out, applying to it the rule with respect to a tenancy at will, although another construction was possible.¹⁴²

§ 85. Unfilled blanks—Written and printed clauses.

It is no common occurrence for unfilled blanks to be left in leases, especially where printed forms are used. Occasionally the lease for this reason is so uncertain as to be void. Thus where the operations were to be commenced and prosecuted for two years from the date of the lease, "or thereafter pay to the party of the first part \$—— per ——, until work is commenced," the lease was held void for uncertainty by reason of the unfilled blanks. The lease otherwise was a hard one, and the court seized upon the uncertainty to declare it void.¹⁴³ If an oil lease be partly written, and an ambiguity arise out of the inconsistency between the printed and written parts, the latter will control. This is the rule with respect to all instruments that are partly printed and partly written.¹⁴⁴ And it is espe-

Co. v. Bridgewater Gas Co., 51 W. Va. 583; 42 S. E. 655; 59 L. R. A. 566; cited in *Paraffine Oil Co. v. Cruce*, *supra*.

¹⁴² *Oglesbys v. Hughes*, 96 Va. 115; 30 S. E. Rep. 439; *Scott v. Lafayette Gas Co.*, 42 Ind. App. 614; 86 N. E. Rep. 495; *Swift v. Occidental, etc., Co.*, 141 Cal. 161; 74 Pac. Rep. 700. As to unauthorized changes becoming binding, see *Barnsdall v. Boley*, 119 Fed. Rep. 191 and *Southern v. South Penn. Oil Co.*, 74 W. Va. 213; 81 S. E. 981.

Construction by parties conclusive, when meaning doubtful. *Smit v. South Penn. Oil Co.*, 59 W. Va. 204; 53 S. E. Rep. 152; *Moore v. Ohio Valley Gas Co.*, 63 W. Va. 455; 60 S. E. 40; *Scott v. Lafayette Gas Co.*, 42 Ind. App. 614; 86 N. E. 495; *Kelly v. Harris (Ok.)*, 162 Pac. 218.

¹⁴³ *Eaton v. Wilcox*, 42 Hun 61.

See where a similar lease was in litigation in an action for specific performance. *Superior Oil & Gas Co. v. Nehlin*, 25 Okl. 809; 108 Pac. 545; 138 Am. St. 942.

¹⁴⁴ *Fort Orange Oil Co. v. Wichman*, 17 Ohio Cir. Ct. Rep. 57; 9 Ohio Cir. Dec. 650; *McArthur v. Tionesta Gas Co.*, 28 Pa. Super Ct. Rep. 568.

The printed parts of a lease provided that the lessee could surrender the lease, and all liabilities would then cease. The written portion provided that the lessee should furnish the lessor the gas from a well "so long as it was marketed from said well." It is held, that the lessee could not surrender the lease and thereby escape liability for not furnishing gas. *Amsdell v.*

cially so where the parties have acted in accordance with the written stipulations.¹⁴⁵

§ 86. Execution of lease.

If a statute provide the manner or form in which a lease shall be executed, it must be followed, or else it will be void. Thus in Ohio a statute provides that the signature of a lessor of a lease exceeding three years must be attested by two subscribing witnesses; and under its provisions it is held that if there be no such attestation, the lease is void.¹⁴⁶

§ 87. Defective execution or acknowledgment.

A lessee cannot assert an imperfect execution of a lease to escape the payment of rent or royalty; nor the fact that the lessor has not used his correct name, or had used an assumed one.¹⁴⁷ And the fact that the acknowledgment is not such as to bind a married woman making it will not prevent her recovering rentals from the lessee in an action brought by her after the lease had expired by its own limitation.¹⁴⁸ If a seal is required in the execution of a lease by a corporation and one is not used, yet if the lessor, or its successors, accept rent or royalty under the lease it will be estopped to deny its validity.¹⁴⁹

Cherry Gas & Oil Co., 145 N. Y. Sup. 825.

¹⁴⁵ Kokomo Natural Gas Co. v. Albright, 18 Ind. App. 151; 47 N. E. Rep. 682.

Where an oil lease did not fix a time when the lessee should begin operations, but provided that, in case no well was completed within — years from the date of the lease, the grant should be void unless the lessee should pay an agreed acreage in advance, it was held that the lessee was only entitled to a reasonable time within which to begin operations. Erie Crawford Oil Co. v. Meeks, 40 Ind. App. 156; 81 N. E. Rep. 518.

¹⁴⁶ Langmade v. Weaver, 65 Ohio

St. 17; 60 N. E. Rep. 992. See Marks v. Rushville Gas & Oil Co., 30 Ohio Cir. Ct. Rep. 798.

A lease, otherwise valid, is not invalidated because executed on Sunday. Kraut v. Hoy Oil Co., 263 Ill. 54; 105 S. E. 26.

¹⁴⁷ Marmet Co. v. Archibald, 37 W. Va. 778; 17 S. E. Rep. 299.

¹⁴⁸ Kunkle v. People's Gas Co., 165 Pa. St. 133; 30 Atl. Rep. 719; 33 L. R. A. 847.

Reformation of acknowledgment under Pennsylvania Act of May 25, 1879. P. L. 149. Manufacturers', etc., Co. v. Douglass, 130 Pa. St. 283; 18 Atl. Rep. 630.

¹⁴⁹ Rieknell v. Austin, 62 Fed. Rep. 432.

§ 88. Parol change of written lease.—Change made in lease.

A parol change of a written lease already executed is valid, especially if it relates to the consideration to be paid for it.¹⁵⁰ If the lease be altered, without the consent of the lessor, by writing in it additional conditions; and the lessor, with knowledge that the changes have been made, make no objection, but insist throughout the term (or even a part of it) on the performance of the contract by the lessee, and accept royalties or rents thereunder, such lessee will waive his right to insist on the invalidity of the lease because of the alteration.¹⁵¹

§ 89. Acceptance.—Estoppel.

Acceptance of a lease may be shown by an actual oral or written acceptance. Taking it to the proper office, by the lessee, and filing it for recording is such an act as from which an acceptance may be presumed, or from which an inference of acceptance may be drawn. Entering upon the premises and beginning the performance of the agreements or covenants contained in the lease is such an act of acceptance as will estop the lessee from saying that he had not accepted the lease.¹⁵² If a co-lessee has signed the lease on behalf of both not only will such co-lessee be estopped to deny he had no authority to sign for his fellow lessee, but the latter, by accepting benefits under the lease ratifies the act of the co-lessee in signing his name to the lease, especially if he knew at the time it was done that his name had been so signed.¹⁵³ Where a lessee denies the execution of a lease, a printed form, such as the lessee generally uses, and which is printed in a book used in an office of public records, cannot be put in evidence; nor can the declarations of an alleged agent, that he signed the deed on behalf of the lessee, be

¹⁵⁰ *Sargent v. Robertson*, 17 Ind. App. 411; 46 N. E. Rep. 925; *Wilgus v. Whitehead*, 89 Pa. St. 131. See *Vanderlin v. Hovis*, 152 Pa. St. 11; 25 Atl. Rep. 232.

¹⁵¹ *Barnsdall v. Boley*, 119 Fed. Rep. 191; *Rogers v. Maloney* (Ore.), 165 Pac. 357.

¹⁵² *Ahrns v. Chartiers Valley Gas Co.*, 188 Pa. St. 249; 41 Atl. Rep. 739; *Grove v. Hodges*, 55 Pa. St. 504; *Harlan v. Logansport, etc., Co.*, 133 Ind. 323; 32 N. E. Rep. 930; *Indianapolis, etc., Co. v. Kibbey*, 135 Ind. 357; 35 N. E. Rep. 392.

¹⁵³ *Rice v. Ege*, 42 Fed. Rep. 661.

used, unless used to contradict the testimony of such alleged agent.¹⁵⁴

§ 90. Lessee need not sign lease.—Deed.

A lessee need not sign the lease; by the acceptance of it he is bound by all its provisions. "Nor is it material that this contract is not signed by the grantee. The acceptance of the deed makes it a contract in writing, binding upon the grantee just as the acceptance by a lessee of a lease in writing signed only by the lessor makes it a written contract binding upon such lessee; and suit can be instituted upon it, and the same rights maintained, as though it were also signed by the grantee."¹⁵⁵

§ 91. Separate owners giving joint lease.(a)

There is nothing to prevent the owners of separate and distinct tracts of land giving a joint lease of their separate premises on royalty payable to them jointly; and if the lessee purchase the land of one of them, he must continue paying one-half the royalty to the other.¹⁵⁶ So where a widow executed

¹⁵⁴ *Morris v. Guffey*, 188 Pa. St. 534; 41 Atl. Rep. 731.

¹⁵⁵ *Schumucker v. Sibert*, 18 Kan. 104; *Indianapolis Natural Gas Co. v. Kibbey*, 135 Ind. 357; 35 N. E. Rep. 392; *Midland R. W. Co. v. Fisher*, 125 Ind. 19; 24 N. E. Rep. 756; *Ricard v. Sanderson*, 41 N. Y. 179; *Atlantic Dock, etc., Co. v. Leavitt*, 54 N. Y. 35; 13 Am. Rep. 556; *Rogers v. Eagle Fire Co.*, 9 Wend. 611, 618; *Spaulding v. Hal-lenbeck*, 35 N. Y. 204; *Huff v. Nick-erson*, 27 Me. 106; *Burbank v. Pills-bury*, 48 N. H. 475; *Goodwin v. Gil-ber*t, 9 Mass. 510; *Harrison v. Vree-land*, 38 N. J. L. 366; *Harlan v. Logansport Natural Gas Co.*, 133 Ind. 323; 32 N. E. Rep. 930; *Chandler v. Hart*, 161 Cal. 405; 119 Pac. 516.

A person whose name is not mentioned in the body of the lease is

not a party to it, nor bound by it as grantor, although he signs and acknowledges it as his deed. *Barnsdall v. Boley*, 119 Fed. Rep. 191. And one whose name is mentioned in the body of the lease as a lessor, but who does not sign the lease, is not a party thereto, and need not be joined with the other lessor as plaintiff in an action to recover royalties. *Boal v. Citizens' Natural Gas Co.*, 23 Pa. Super Ct. 339.

(a) Forfeiture, § 920.

¹⁵⁶ *Higgins v. California, etc., Co.*, 109 Cal. 304; 41 Pac. Rep. 1087; *Rymer v. South Penn. Oil Co.*, 54 W. Va. 530; 46 S. E. 459. For an instance of a lease of two separate tracts of this kind, made by husband and wife, that was held their joint lease, see *Harness v. Eastern Oil Co.*, 49 W. Va. 232; 38 S. E. Rep. 662. See also *Northwestern Ohio*,

an oil and gas lease on lands of which she owned an undivided one-half, and the other half belonged to her children, a subsequent lease of the same lands to a third person by her children was held to convey their undivided interest and each lessee was entitled to the possession of the premises to mine for gas and oil, but neither was entitled to exclusive possession thereof.^{156a} Where a person owning a one-half interest in land conveys such one-half, reserving "the one-fourth part of all oil, gas, or other minerals in, under, or upon said land," and thereafter executes an oil lease by which the lessees covenants to deliver to the lessor "one-eighth of all the oil produced from the one-quarter interest of said first party, or in other words, the one-fourth of one-eighth royalty he may produce from said land," the lessor is not entitled to the one thirty-second part of all the oil produced on the entire property, but only to a one thirty-second of a half interest in the property.^{156b} An oil lease, whereby several lessors of tracts owned separately by them for a gross price, without stating the amount paid to each lessor of the land belonging to him, creates a joint obligation on the part of all the lessors.^{156c} A lease executed by several owners of contiguous lands described as a single tract, contemplating a single well as a condition to its continuance and providing for payment of commutation money to the lessors jointly, is a joint lease of a single tract.^{156d}

§ 92. Notice to one of several lessees.

A notice to one of several joint lessees is notice to all of them. Thus where a lease or grant was made to four persons jointly, a notice addressed to one of them that the lease or

etc., *Co. v. Ullery*, 68 Ohio St. 259; 67 N. E. Rep. 494, and *Wettengel v. Gormley*, 160 Pa. St. 559; 28 Atl. Rep. 934; 40 Am. St. Rep. 733.

Of an instance of a father and minor son, see *Swint v. McCalmont Oil Co.*, 184 Pa. St. 202; 38 Atl. Rep. 1021.

^{156a} *Compton v. People's Gas Co.*, 75 Kan. 572; 89 Pac. Rep. 1039; 10 L. R. A. (N. S.) 787; *Wettengel v. Gormley*, 160 Pa. 559; 28 Atl. 934; 40 Am. St. 733; *Wettengel v. Gormley*, 184 Pa. 354; 39 Atl. 57.

^{156b} *Dickson v. Fertig*, 21 Pa.

Super Ct. Rep. 283; *Northwestern Ohio Natural Gas Co. v. Ullery*, 68 Ohio St. 259; 67 N. E. 494.

^{156c} *Nabors v. Producers Oil Co.* 140 La. 985; 74 So. Rep. 527; L. R. A. 1917 D 1115.

^{156d} *South Penn. Oil Co. v. Snodgrass*, 71 W. Va. 438; 76 S. E. 961; 43 L. R. A. (N. S.) 848.

In an action for damages for a failure to drill wells all the lessors must join. *Steele v. American Oil, etc., Co. (W. Va.)*, 92 S. E. 410; *Coffman v. Hope Natural Gas Co.*, 74 W. Va. 57; 81 S. E. 575.

grant had expired, and to keep off the premises, was held a sufficient notice to all of them.¹⁵⁷

§ 93. Second lease.—Notice.

A person who takes a lease on premises already leased, with notice of the first lease, takes it subject to the rights of the first lessee.¹⁵⁸ Notice to the agent of the second lessee is notice to the lessee, if such agent is employed by such lessee in securing leases for him.¹⁵⁹ Where the law partner of the second lessee, on being consulted by the lessor, drew up the lease, knowing all the facts, for the express purpose of defeating the title of the holders of the prior and unrecorded lease, it was held that such lessee was chargeable with notice of the facts brought to his partner's knowledge during the consultation, and he took his lease subject to the first lessee's rights.¹⁶⁰ If the lessee does not record his lease, the drilling of a well in the vicinity of the leased premises, on another farm, in fulfillment of a covenant with his lessor, will not be notice to an innocent second lessee; for such an act is not sufficient to put others on notice of his possession of the leased premises.¹⁶¹ Where a statute required a lessee or licensee to record his oil or gas lease or license, and made its record the only notice that could be available against third persons acquiring an interest in the land adverse to the lessee, unless the latter was in actual possession; it was held

¹⁵⁷ *Detlor v. Holland*, 57 Ohio St. 492; 49 N. E. Rep. 690; 40 L. R. A. 266; *Baker v. Kellogg*, 29 Ohio St. 663.

¹⁵⁸ *Thompson v. Christie*, 138 Pa. St. 230; 27 W. N. C. 87; 20 Atl. Rep. 934; 11 L. R. A. 236; *Henne v. South Penn. Oil Co.*, 52 W. Va. 192; 43 S. E. Rep. 147; *Bartley v. Phillips*, 179 Pa. 175; 36 Atl. 217; *Carnegie Natural Gas Co. v. Phila. Co.*, 158 Pa. 317; 27 Atl. 95; *Hicks v. Gas Co.*, 207 Pa. 570; 57 Atl. 55; 65 L. R. A. 200; *Pyle v. Henderson*, 65 Pa. 39; 63 S. E. 762; *National Oil, etc., Co. v. Teel*, 95 Tex. 586; 67 S. W. 545; 68 S. W. 797; *Loeb v. Conley*, 160 Ky. 91; 169 S. W. 575.

In Ohio the lease must be recorded or the lessee have actual possession to put the second lessee or a purchaser on his guard. *Northwestern, etc., Co. v. City of Tiffin*, 59 Ohio St. 429; 54 N. E. Rep. 77.

¹⁵⁹ *South Penn. Oil Co. v. Stone* (W. Va.), 57 S. E. Rep. 374.

¹⁶⁰ *Thompson v. Christie*, *supra*; *Compton v. People's Gas Co.*, 75 Kan. 572; 89 S. W. 1029; 10 L. R. A. (N. S.) 787; *Gillespie v. Fulton Oil & Gas Co.*, 236 Ill. 188; 86 N. E. 219; *Hicks v. American Nat. Gas Co.*, 207 Pa. 570; 57 Atl. 55; 65 L. R. A. 200.

¹⁶¹ *Aye v. Philadelphia Co.*, 193 Pa. St. 457; 44 Atl. Rep. 556.

that a lease which gave the lessee the sole right for a term of years to drill and operate for oil and gas upon the leased premises, although not witnessed as the statute required to constitute it a legal lease, was still good as a lease, and entitled to record as such; and also good in equity as an agreement to make a lease; and the record of it was notice to third persons of all rights of the lessee under it. It was also said that if the instrument was not one entitled to record, then notice of its contents could not be given to third persons by recording it, but actual knowledge of its provisions would be effectual to charge a subsequent lessee with notice of the equities of the grantor therein.¹⁶²

¹⁶² *Allegheny Oil Co. v. Snyder*, 106 Fed. Rep. 764; 45 C. C. A. 604. In this case it was held that a suit to quiet title would lie in favor of the lessee out of possession, under a statute giving one either in or out of possession such a right.

One who has actually read the record of an instrument not entitled to record is chargeable with notice of the contents of the original. *Walter v. Hartwig*, 106 Ind. 123; 6 N. E. Rep. 5; *Musick v. Barney*, 49 Mo. 458; *Hastings v. Cutler*, 24 N. H. 481; *Gilbert v. Jess*, 31 Wis. 110; *Musgrove v. Bonser*, 5 Ore. 313; 20 Am. Rep. 737.

The second lessee, with notice of the first lease, cannot question its validity on the ground that it lacks mutuality, or that it has been revoked by the giving of the second lease. *Compton v. People's Gas Co.*, 75 Kan. 572; 89 Pac. Rep. 1039; 10 L. R. A. (N. S.) 787; *Loeb v. Conley*, 160 Ky. 91; 169 S. E. 575.

Where an agent of a lessee of oil lands, whose business it was to take leases, had knowledge of a prior lease at the time of taking his principal's lease, and the vice-president of such lessee also had sufficient information to put him on

inquiry, and the lessee interposed no defense of innocent purchaser, the lessee's rights will be subordinate to those of the prior lessee. *South Penn. Oil Co. v. Stone*, 57 S. E. 374.

The fact that a company had drilled within certain territorial limits of the tract described in its lease, but not on the leased land, does not constitute such actual and open possession of the land as to give effect to the unrecorded lease under Ohio Rev. St. § 4112a. *Marks v. Rushville Gas & Oil Co.*, 30 Ohio Cir. Ct. R. 798.

A purchaser of land is bound by a duly recorded lease thereon. *Busch-Everett Co. v. Vivian Oil Co.*, 128 La. 886; 55 So. 564. But if he has made inquiry of a reputable abstractor who erroneously told him there was no lease of record, he will be liable only for the value of the oil he extracts before actual notice, less the cost of development. *Guffey v. Smith*, 237 U. S. 101; 33 Sup. Ct. 526; 59 L. Ed. 856; reversing 202 Fed. 105; 120 C. C. A. 436. So he must take notice of a suit pending to cancel it. *Fox v. Simmons*, 251 Ill. 316; 96 N. E. 233.

§ 94. Right of way of railroad.

One who leases land for gas and oil purposes is charged with notice of the rights of a railroad company occupying the premises as a right of way, and to the extent of the conflict between the terms of the lease and the rights of the railroad company the rights of the latter are paramount. The general rule is that a railroad company has only an easement for its right of way, at least if it acquires such right of way by adverse possession. Where such is the case, a lessee of a tract of land through which the right of way runs has a superior right to the gas and oil underneath such right of way and may enjoin the railroad company, or its lessee, from sinking a well on its right of way. "The possession of the company which owned the easement was so far exclusive that the gas company was not authorized to enter upon the right of way for the purpose of drilling a gas well, but, in case the easement should be abandoned while the gas company's lease continues in force, such company would then have the right to drill gas wells upon said strip of land. The gas company, as respects the right to drill for gas, stands in the position of the owner of the fee. The mere fact that such an owner may not enter and enjoy it will not destroy his property rights in the servient estate. In a case of this kind, where the gas company may draw off the gas in the common reservoir from a point within the right of way, it hardly seems to admit of debate that the proprietary interest of such company was about to be invaded by the drilling of the gas well on the right of way. Under the evidence in the case, it must be inferred that one of the purposes of a gas company in leasing a large tract of land for gas purposes is that the flow of gas in such wells as it sinks thereon may not be diminished by the sinking of wells by third persons within the area covered by the lease. Under the facts disclosed, we do not doubt the right of the gas company to an injunction restraining the drilling of wells upon that part of the right of way which extends across the tract leased by it."^{162a}

^{162a} Consumers' Gas Trust Co. v. American Plate Glass Co., 162 Ind. 393; 68 N. E. Rep. 1020. In this case a pipe line had been constructed within the limits of the railroad's right of way over lands leased for

natural gas purposes, except a short link, at a cost of \$5,000; and the court refused to enjoin the completion, there being an adequate remedy at law for damages.

§ 95. Enjoining trespasses on adjoining land.

If the proprietor of adjoining lands have the right to sink wells and extract oil and gas—and it is an invariable rule that he has such a right, unless he has parted with it,—his neighbor can not object to a trespasser on such adjoining lands putting down a well and taking out oil and gas. For such a violation of law the wrongdoer's accountability is only to the proprietor who has a standing to complain of the trespass involved in drilling the well.^{162b}

§ 96. Agent of lessee may take lease after forfeiture.

The agent of a lessee, who has entered on the leased premises as such agent, may take a lease from the owner of such premises after a forfeiture has been made; and if for some reason his principal's lease is void, he may take a lease of the premises after it is fully developed that his principal will not be able to obtain any benefit under his lease.¹⁶³

§ 97. Exclusive right of licensee of lessee.—Solid mineral—oil.

"A license to dig and take ore is never exclusive of the licensor, unless expressed in such words as to show that it was the intention of the parties. Where the license simply gives the licensee the right to dig and take ore, the licensor may take ore from the same mine at the same time, and also grant permission to others to exercise the same right."¹⁶⁴ The words of a license may be such as to exclude the right of the grantor to

^{162b} Consumers' Gas Trust Co. v. American Plate Glass Co., 162 Ind. 393; 68 N. E. Rep. 1020.

Equity may enjoin a second lessee from removing oil from the lands covered by a prior lease at the instance of the senior lessee. *Smith v. Root*, 66 W. Va. 633; 66 S. E. Rep. 1005; 30 L. R. A. (N. S.) 176; *Midland Oil Co. v. Turner*, 179 Fed. Rep. 74 (modifying *Turner v. Scep*, 167 Fed. Rep. 646); *Scep v. Spade*, 179 Fed. Rep. 77; *Gillespie v. Fulton Oil & Gas Co.*, 239 Ill. 326; 88 N. E. Rep. 192.

¹⁶³ *Duffield v. Michaels*, 97 Fed. Rep. 825.

The lessee of mining property is

not the agent of the owner. *Wilkins v. Abell*, 26 Colo. 462; 58 Pac. Rep. 612.

¹⁶⁴ *Silsby v. Trotter*, 29 N. J. Eq. 228; *Mountjoy's Case*, Godb. 18; 1 Amb. 307; 4 Leon. 147; *Chetham v. Williamson*, 4 East 469; *Grubb v. Bayard*, 2 Wall Jr. 81; *Funk v. Haldeman*, 53 Pa. St. 229; *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290; *Manganese Co. v. Trotter*, 29 N. J. Eq. 561; *Jennings Bros. & Co. v. Beale*, 158 Pa. St. 283; 27 Atl. Rep. 948; *Massott v. Moses*, 3 S. C. 168; *Barker v. Dale*, 2 Fed. Cas. 810; 3 Pittsb. 190; *Woodside v. Ciceroni*, 93 Fed. Rep. 1; 35 C. C. A. 177.

mine.¹⁶⁵ Thus a license giving the licensee "full and free liberty" to work will be sufficient to make the license an exclusive one.¹⁶⁶ "A license may confer a sole or exclusive right, or simply a right in common. If it simply confers a right to dig and take ore, or to work a mine, it is not exclusive, and the licensor may himself take ore from the same land or mine, or license others to do so. And when it authorizes the licensee to dig and carry away all the ore to be found in certain lands, it does not confer an exclusive right. If it be merely a license, and no estate in the property or land passed, the licensee acquires no title to the ore until he has severed it. Such a license has been adjudged to confer a privilege similar to a right of common *sans nombre*, to give a right without stint as to quantity, but not exclusive of the grantor. There can be no doubt that the instrument under consideration conferred an exclusive right. The licensor has expressed his intention in that respect in plain words."¹⁶⁷ These are cases of solid minerals, and at first blush one would suppose that the same rules would be applied to gas or oil; such is not the case. Owing to the "fugitive and wandering nature" of oil and gas, if the licensor or lessor could put down a well on the leased premises he might render the right of the licensee or lessee worthless, by drawing off the oil and gas, even after he had expended large sums of money in developing the premises. It necessarily follows that the "grant of well rights is necessarily exclusive."¹⁶⁸ This rule is well illustrated in a Pennsylvania case. The owner of land leased a certain tract of land, according to a division of the tract into numbered sites, each site situated on a lot numbered respectively on a map; and also sites for three wells south of the railroad track on it; to be designated and mutually agreed upon by him and the lessee, for a term of fifteen years, "with

¹⁶⁵ *Caldwell v. Fulton* 31 Pa. St. 475.

¹⁶⁶ *Doe, d. Hanley v. Wood*, 2 Barn. and Ald. 724; *Sutherland v. Heathcote* [1892], Ch. 504; *East Jersey Co. v. Wright*, 32 N. J. Eq. 248.

¹⁶⁷ *East Jersey Co. v. Wright*, 32 N. J. Eq. 248; *Johnston Iron Co. v. Cambria Iron Co.*, 32 Pa. St. 241; *Gloninger v. Franklin Coal Co.*, 55

Pa. St. 9; *Jennings v. Beale*, 158 Pa. St. 283; 27 Atl. Rep. 948; *Reynolds v. Cook*, 83 Va. 817; 3 S. E. Rep. 710; *Bronson v. Lane*, 91 Pa. St. 153.

¹⁶⁸ *Funk v. Haldeman*, 53 Pa. St. 229, 247; *Westmoreland, etc., Co. v. DeWitt*, 130 Pa. St. 235; 18 Atl. Rep. 724; 29 Am. L. Reg. 93; 5 L. R. A. 731.

the sole and exclusive right and privilege during said period of digging and boring for oil and other minerals on said lot." The lessee, for oil mining purposes, was restricted to the specified sites; and he had no right of possession for any other purpose at any other place on the tract of land described. It was held that the lessor could not drill wells on the tract of land outside of the designated sites, nor authorize anyone else to do so; and if he undertook to do so a court of equity would restrain him; for the reason that the sinking of wells outside of such sites would lessen the production of the wells drilled by the lessee, and the injury would be destructive of his rights and was incapable of an adequate remedy at law.¹⁶⁹

§ 98. Implied covenant.(a)

By giving a lease the lessor does not covenant that oil or gas is on the premises, or that it can be found on them.¹⁷⁰ There is, however, an implied covenant of right of entry and quiet enjoyment for the purposes of the lease; and it is broken by the exclusion by the lessor of the lessee from taking possession for the purposes of the lease, or his withholding from him the possession for such purposes.¹⁷¹ But making another lease during

¹⁶⁹ Duffield v. Hue, 136 Pa. St. 602; 20 Atl. Rep. 526; Duffield v. Hue, 129 Pa. St. 94; 18 Atl. Rep. 566; Duffield v. Rosenzweig, 114 Pa. St. 520; 23 Atl. Rep. 4; Duffield v. Rosenzweig, 150 Pa. St. 543; 24 Atl. Rep. 705; Union Petroleum Co. v. Bliven Petroleum Co., 72 Pa. St. 173; Heller v. Daley, 28 Ind. App. 555; 63 N. E. Rep. 490. See Guffey v. Deeds, 9 Pa. Co. Rep. 449; § 895, note.

(a) Quoted in Culbertson v. Iola Portland Cement Co., 87 Kan. 529; 125 Pac. 81; Ann. Cas. 1914 A 610.

¹⁷⁰ Kokomo Natural Gas Co. v. Albright, 18 Ind. App. 151; 47 N. E. Rep. 682; Shenk v. Stahl, 35 Ind. App. 493; 74 N. E. Rep. 538.

¹⁷¹ Knotts v. McGregor, 47 W. Va. 566; 35 S. E. Rep. 899; Kilcoyne v. Southern Oil Co., 61 W. Va. 538; 56

S. E. Rep. 888; Headley v. Hoopen-garner, 60 W. Va. 626; 55 S. E. 144; Tucker v. Watts, 25 Ohio Cir. Ct. Rep. 320; Shenk v. Stahl, *supra*.

Whatever is implied in an oil lease is as effectual as what is expressed. Brewster v. Lanyon Zinc Co., 140 Fed. Rep. 801; 72 C. C. A. 213.

"Implication" is but another name for intention and if it arises from the language of the lease when considered in its entirety, it is controlling. Jennings v. Southern Carbon Co., 73 W. Va. 215; 80 S. E. 368.

When oil is produced, the amount stipulated for in the lease is also protected by the implied covenant for peaceable possession. Kilcoyne v. Southern Oil Co., 61 W. Va. 538; 56 S. E. Rep. 888.

the term, by the lessor, whether the first lessee be in actual possession or not, is not a violation of the covenant for quiet enjoyment.¹⁷² As has been said elsewhere, there is not only a covenant on the part of the lessee that he will fully develop the leased premises, but that he will do so with diligence.¹⁷³ There is also an implied covenant on the part of the lessee that he will put down enough wells to protect the leased premises from being drained by wells on adjacent territory.¹⁷⁴ If, however, the lease

¹⁷² *Knotts v. McGregor, supra.*

In Pennsylvania the implication of a covenant for quiet enjoyment arising from words of grant in a conveyance by virtue of Act of May 28, 1715, Sec. 6, applies only to an estate of inheritance in fee simple, and not to a lease of a mere right to drill oil or gas wells and take the products. *Chambers v. Smith*, 183 Pa. St. 122; 38 Atl. Rep. 522.

¹⁷³ *Huggins v. Daley*, 99 Fed. Rep. 606; 48 L. R. A. 320; *Steelsmith v. Gartlan*, 45 W. Va. 27; 29 S. E. Rep. 978; 44 L. R. A. (See the subject of "Forfeiture.") *Adams v. Stage*, 18 Pa. Super Ct. Rep. 308; *Sharp v. Behr*, 117 Fed. Rep. 864; *Core v. N. Y., etc., Co.* (W. Va.), 43 S. E. Rep. 128; *Venedocia Oil & Gas Co. v. Robinson*, 71 Ohio St. 302; 73 N. E. Rep. 222; 104 Am. St. 773; *Baker v. Stow*, 30 Ohio Cir. Ct. Rep. 724; *J. M. Guffey Petroleum Co. v. Oliver* (Tex. Civ. App.), 79 S. W. Rep. 884; *Howerton v. Kansas Nat. Gas Co.*, 82 Kan. 367; 108 Pac. Rep. 813; reversing 81 Kan. 553; 106 Pac. Rep. 47; 34 L. R. A. (N. S.) 34; *Poe v. Ulrey*, 233 Ill. 56; 84 N. E. Rep. 46; *Logan Nat. Gas & Fuel Co. v. Great Southern Gas Co.*, 126 Fed. Rep. 623; *Kellar v. Craig*, 126 Fed. Rep. 630; *Consumers' Gas Trust Co. v. Littler*, 162 Ind. 320; 70 N. E. Rep. 363; *Steelsmith v. Gartlan*, 45 W. Va. 27; 29 S. E. 978; 44 L. R. A. 107; *McIntosh v. Robb*, 4 Cal. App. 484;

88 Pac. Rep. 517; *Brewster v. Lanyon Zinc Co.*, 140 Fed. Rep. 801; 72 C. C. A. 213; *Powers v. Bridgeport Oil Co.*, 238 Ill. 397; 87 N. E. Rep. 381; *New American Oil, etc., Co. v. Troyer*, 166 Ind. 402; 76 N. E. Rep. 253; *New American Oil Co. v. Wolff*, 166 Ind. 402; 76 N. E. Rep. 255.

If the provisions of the lease specifically permit delay, the lessor cannot complain of any delay within its provisions. *Ringle v. Quigg*, 79 Kan. 581; 87 Pac. Rep. 724; *Brewster v. Lanyon Zinc Co.*, 140 Fed. Rep. 801; 72 C. C. A. 213.

A grant in consideration of one dollar of all the oil and gas under certain premises, with the right to enter thereon to operate the same, excepting to the grantor one-sixth part of the oil produced, to be delivered in the pipe lines with which the grantee may connect his wells, implies an engagement by the lessee to develop the premises. *Venedocia Oil & Gas Co. v. Robinson*, 73 N. E. 222; 71 Ohio St. 302; 104 Am. St. 773.

¹⁷⁴ *Harris v. Ohio Oil Co.*, 57 Ohio St. 629; 50 N. E. Rep. 1129; 48 N. E. Rep. 502; *Colgan v. Forest Oil Co.*, 30 Pittsb. L. J. (N. S.) 68; *Kleppner v. Lemon*, 176 Pa. St. 502; 35 Atl. Rep. 109; *Glasgow v. Chartiers*, 152 Pa. St. 48; 25 Atl. Rep. 232; *Allegheny Oil Co. v. Snyder*, 45 C. C. A. 604; 106 Fed. 764; *J. M. McGuffey Petroleum Co., Tex.*, 79 S. W. 884; *Acme Oil Co.*

specifies the number of wells that are to be drilled, there is no implied covenant that more than the number specified are to be drilled, even though more are needed to fully develop the territory, or to protect the premises from wells on adjoining territory.¹⁷⁵ The lessee is under no implied covenant to work the premises at a loss, where the lessor is to receive a part of the product as his compensation;^{175a} and his judgment whether or not the work can be carried on at a profit, if honest, is entitled to great weight, and should prevail as against the opinion of the lessor, or experts, or the court's or all of them, to the contrary.¹⁷⁶ Where the lessee was to pay the lessor a royalty if the flow of gas was sufficiently strong to be used off the premises, and one well was drilled which enabled the lessee to pay the royalty; but afterwards the well having got out of order, was abandoned; it was held that the lessee was under no implied covenant to fully develop the premises for gas for the common benefit of the parties to the lease; for the reason that, because of the peculiar nature of natural gas, the effort of the lessee to discharge such an obligation might result in the entire destruction of the leasehold.¹⁷⁷ If the causes for forfeiture of a lease are specified in it, the courts will not infer that there are other

v. Williams, 140 Cal. 681; 74 Pac. 296; Huggins v. Dailey, 40 C. C. A. 12; 99 Fed. 606; 48 L. R. A. 320; Phillips v. Hamilton, 17 Wyo. 41; 95 Pac. 846; Powers v. Bridgeport Oil Co., 238 Ill. 397; 87 N. E. 381; Buffalo Valley Oil & Gas Co. v. Jones, 75 Kan. 18; 88 Pac. 537; Stanley v. United Fuel Gas Co. (W. Va.), 90 S. E. 344; Carper v. United Fuel Gas Co. (W. Va.), 89 S. E. 12.
¹⁷⁵ Colgan v. Forest City Oil Co., 194 Pa. St. 234; 45 Atl. Rep. 119; 75 Am. St. Rep. 695; Brewster v. Lanyon Zinc Co., 140 Fed. Rep. 801; 72 C. C. A. 213; Aye v. Philadelphia Co., 193 Pa. 451; 44 Atl. 555.

^{175a} Hall v. Oil Co., 74 W. Va. 82; 76 S. E. 24; Jennings v. Southern Carbon Co. (W. Va.), 94 S. E. 863; Munsey v. Marnet Oil & Gas Co. (Tex. Civ. App.), 199 S. W. 686.

¹⁷⁶ Young v. Forest Oil Co., 194 Pa. St. 243; 45 Atl. Rep. 121; 30 Pittsb. L. J. (N. S.) 221; Stoddard

v. Emery, 128 Pa. St. 436; 24 W. N. C. 566; 18 Atl. Rep. 339; Hall v. Oil Co., 74 W. Va. —; 76 N. E. 24; Jennings v. Southern Carbon Co. (W. Va.); 94 S. E. 863.

If the lessee claims that gas is being produced in paying quantities and is willing to pay for it, the sum stipulated in the lease, the lease cannot be forfeited upon such a claim. McGraw Oil & Gas Co. v. Kennedy, 65 W. Va. 599; 64 S. E. Rep. 1027; 28 L. R. A. (N. S.) 959.

¹⁷⁷ Knight v. Mfg's. Natural Gas Co. (Pa.), 23 Atl. Rep. 164; 29 W. N. C. 261.

In the case of a sale of a mine, where the contract provided for the payment to the vendor of a certain portion of the net profits arising from operating it, but contained no provision requiring its operation, it was held that there was no implied covenant on the part of the vendee to work the mine. Hawks v. Taylor, 70 Ill. App. 255.

causes of forfeiture not declared in it to be such. Ordinarily a breach of an implied covenant will not work a forfeiture of the lease.¹⁷⁸

§ 99. Covenant running with land.

Covenants that run with the land bind all that hold under the lease, whether as assignee or otherwise. As a rule the intention of the parties to the lease or deed determines the question whether a covenant runs with the land; and to ascertain that intention resort must be had to the words of the covenant, considered, of course, in the light of the circumstances of the transaction and the subject of the grant.¹⁷⁹ A covenant to use due diligence in developing the land is such a covenant.¹⁸⁰ So is a covenant for rent or royalty,¹⁸¹ or a certain amount of the oil produced.¹⁸² An agreement that rent should be paid for so much of the surface of the ground as is used for dumping purposes is a covenant running with the land.¹⁸³ So an agreement that the lessor should have a part of the gas free is such a covenant.¹⁸⁴

¹⁷⁸ *Core v. New York Petroleum Co.*, 52 W. Va. 276; 43 S. E. Rep. 128.

¹⁷⁹ *Landell v. Hamilton*, 175 Pa. St. 327; 34 Atl. Rep. 663.

¹⁸⁰ *Bradford Oil Co. v. Blair*, 113 Pa. St. 83; 4 Atl. Rep. 218.

¹⁸¹ *Fennell v. Guffey*, 139 Pa. St. 341; 20 Atl. Rep. 1048; *Springer v. Gas Co.*, 145 Pa. St. 430; 22 Atl. Rep. 986; *Fennell v. Guffey*, 155 Pa. St. 38; 29 Atl. Rep. 785; *Pierce Fordyce Oil Ass'n v. Woodrum* (Tex. Civ. App.), 188 S. W. 245.

¹⁸² *Akin v. Marshall Oil Co.* (Pa.), 41 Atl. Rep. 748; *Crawford v. Witherbee*, 77 Wis. 419; 46 N. W. Rep. 545; *Pierce Fordyce Oil Ass'n v. Woodrum* (Tex. Civ. App.), 188 S. W. 245.

¹⁸³ *Schooley v. Butler Mining Co.*, 9 Kulp (Pa.) 291.

¹⁸⁴ *Electric City, etc., Co. v. West*

Bridge, etc., Co., 187 Pa. St. 500; 41 Atl. Rep. 458; *Indiana, etc., Oil Co. v. Hinton*, 159 Ind. 398; 64 N. E. Rep. 224; *Pierce Fordyce Oil Ass'n v. Woodrum* (Tex.), 188 S. W. 245; *Indiana Natural Gas & Oil Co. v. Harper*, 50 Ind. App. 555; 98 N. E. 743 (lessor's grantee enforcing covenant with lessor to furnish gas).

Where an oil and gas contract amounts to a defeasible conveyance of an interest in fee, an assignee of the contract who does not specially assume the burden therein is not bound by its terms. *Pierce Fordyce Oil Ass'n v. Woodrum* (Tex. Civ. App.), 188 S. W. 245.

Where an instrument relating to gas and oil rights amounted to a conveyance of an interest in the fee, subject to a defeasance by a condition subsequent, an assignee who did not specially agree to assume

§ 100. Personal covenants.

A right in the lessor to receive gas in a certain quantity, or for a certain purpose, may be a mere personal covenant, and one not binding on an assignee of the lease or grantee of the premises. Such was held to be the case with respect to the right to take coal out of a mine. Thus a will provided as follows: "To my second son, John, I give and bequeath the plantation he now occupies, to be enjoyed by him, his heirs and assigns forever, with free privilege of taking what coal he wants for his own use off the home plantation." When the will was made there was an open mine on the "home plantation," but none on the farm John occupied. The court considered the right to take the coal a mere privilege which was personal to John, and one that did not pass to his grantee of the land devised to him.¹⁸⁵ So an agreement in a lease that the lessee may operate an adjoining tract, if the lessor shall so elect, is personal between the lessor and lessee; and if the lessor has not elected to have it operated, a *bona fide* purchaser takes it free from the right of the lessee to operate it. In such an instance the purchaser is only bound to inquire if the lessor has elected to have the land operated according to the terms of the lease.¹⁸⁶ An agreement on the part of the lessee to devote all his time to the development and operation of the land is purely personal; and if the lease be assigned by the lessor the lessee may operate other territory.¹⁸⁷ An agreement at the end of the lease that the lessor would buy all the tools and machinery used on the leased premises is a personal covenant.¹⁸⁸

the burdens contained in it, it was held not to be bound to perform them; but where the instrument is a mere lease contract the assignee who accepts the assignment of the rights and privilege under the law would be burdened with the obligations and covenants running with the land. *Pierce Fordyce Oil Ass'n v. Woodrum* (Tex. Civ. App.), 188 S. W. 245.

A conveyance of oil and gas in place under a certain tract, with a reservation of title to one-eighth

of that and gas is a covenant running with the land. *Ibid.*

¹⁸⁵ *Coal Co. v. Pierce*, 153 Pa. St. 74; 25 Atl. Rep. 1026; *Indiana, etc., Oil Co. v. Hinton*, 159 Ind. 398; 64 N. E. Rep. 224.

¹⁸⁶ *Emerine v. Steel*, 8 Ohio C. Ct. Rep. 381; 4 Ohio C. Dec. 92; *Norcross v. James*, 140 Mass. 188; 2 N. E. Rep. 946.

¹⁸⁷ *Findlay v. Carson*, 97 Ia. 537; 66 N. W. Rep. 759.

¹⁸⁸ *Etowah Mining Co. v. Wills Valley, etc., Co.*, 121 Ala. 672; 25 So. Rep. 720.

§ 101. Assignment of contract giving interest in land.—Incorporeal hereditament.—Lease.—Surrender.

If a contract concerning the right to drill for oil or gas on certain premises, and to operate them if either or both be found, is such as to operate as a grant of an interest in the premises, then it can be assigned or transferred only in writing, and a parol transfer of it is void. "At common law, corporeal hereditaments were demisable without deed or writing, the lease being perfected in the case of a demise for years, by the entry of the lessee, and by livery of seizin in the case of a lease for life; but a deed was always required for the conveyance of incorporeal hereditaments. The provision of the first section of the English Statute of Frauds,¹⁸⁹ that leases not in writing should have the effect of leases at will, left untouched leases of incorporeal hereditaments.¹⁹⁰ At common law, a lease of corporeal hereditaments might be surrendered to him, who had the reversion or remainder without deed, writing or livery; but a deed was indispensable to a surrender of incorporeal hereditaments.¹⁹¹ At common law, a lease for years or for life might be surrendered by parol or by operation of law.¹⁹² Incorporeal hereditaments, the conveyance of which could not be evidenced and accompanied by livery of seizin, but lay only in grant, always at common law could pass only by deed, and could not be surrendered by operation of law.¹⁹³ By section three of the English Statute of Frauds it was provided, that 'no leases . . . shall be assigned, granted or surrendered, unless it be by deed or note in writing signed, . . . or by act and operation of law.' After the enactment of this statute, which introduced no change as to incorporeal hereditaments, they

An assignment of a lease for a certain sum "and the further sum of \$1,000 if oil is found in any well drilled on any of the territory, and said well or territory is operated by the said assignee," creates no covenant which runs with the land, and the assignor is not entitled to recover of the assignee the \$1,000 mentioned in the assignment. *Fisher v. Guffey*, 193 Pa. 393; 44 Atl. 452.

¹⁸⁹ 29 Car. II, Chap. 3.

¹⁹⁰ 2 Platt Leases, 1, 2.

¹⁹¹ 2 Platt Leases, 499.

¹⁹² *Lynch v. Lynch*, 6 Irish L. R. 131.

¹⁹³ Brown St. of F., Sec. 2, 5; Reed St. of F., Sec. 767; Washb. Real Prop., Sec. 552; *Lyon v. Reed*, 13 M. & W. 285; *Wood Landlord and Tenant* (2d ed.), 1154, and notes.

could not be surrendered except by deed.¹⁹⁴ The common law in respect to the surrender of leases must be regarded as in force in this State, except so far as it is modified by our own statutes.¹⁹⁵ Our statutes do not contain, as do those of some of our States, any express, separate provision relating to assignments or surrenders of leases, corresponding to the third section of the English statute.¹⁹⁶ But our statutes contain nothing expressly or by necessary implication forbidding surrender by act and operation of law, and construing our express requirements concerning conveyances as relating to transfer by contract, and as including surrenders in fact, we may hold that such surrenders as properly come within the meaning of the words 'by act and operation of law' as used in the British Statute of Frauds and in similar statutory provisions of sister States, may be upheld in this State. The provisions of the English statute for surrender by act and operation of law was but a statutory regulation of a common law method. It seems sufficiently plain that an interest in land lying only in grant or a term, unless it be for three years or less, cannot be surren-

¹⁹⁴ *Lyon v. Reed*, 13 M. and W. 285; 2 Platt Leases, 503; Brown St. of F., Sec. 2, 5.

A contract of a landowner of "all the oil and gas in and under" a certain tract of land, and providing penalties for delay in the drilling of wells, can only be surrendered in writing sufficient to convey the real estate. *Heller v. Dailey*, 28 Ind. App. 555; 63 N. E. Rep. 490. See also *Heller v. Dailey*, 34 Ind. App. 424; 70 N. E. 821.

¹⁹⁵ R. S. 1901, Sec. 236.

¹⁹⁶ The court had already quoted a statute which provided that "Conveyances of lands or of any interest therein, shall be by deed in writing, subscribed, sealed and duly acknowledged by the grantor or by his attorney, except *bona fide* leases for a term not exceeding three years." (R. S. Indiana, 1901, Sec. 3335). and it had said that the term "grantor," as used in the statute,

embraced "every person by whom any estate or interest in land is created, granted, bargained, sold, conveyed, transferred or assigned." (R. S. Indiana, 1901, Sec. 3375.) Another statute provided that the word "land" included "lands," "tenements" and "hereditaments." (R. S. Indiana, 1901, Secs. 241, 1309.) While still another dispensed with the use of the words "heirs and assigns" to create in the grantee and estate of inheritance. (R. S. Indiana, 1901, Sec. 1901.) By the Statute of Frauds of that State no action could be brought on any contract for the sale of lands unless the contract or some memorandum or note thereof was in writing and signed by the party to be charged therewith, or by some person authorized to sign it, excepting leases not exceeding the term of three years. (R. S. Indiana, 1901, Sec. 6629.)

dered by express contract, that is, cannot be transferred or yielded up by surrender in fact, without a writing sufficient for the conveyance of an interest in land greater than can be created by parol."¹⁹⁷

§ 102. Lessee liable after assignment on express covenants.

"It is generally established that the lessee, who before his assignment of the lease to a third person is bound by both the express and implied covenants of the lease, continues after the assignment to be liable upon his express covenants therein, as if no assignment had been made, and that the assignee is liable to the lessor upon all the covenants which run with the land, for non-performance thereof while the estate is in him, but is not liable for breach of any covenants which occur before the assignment to him or after his assignment to another, the liability of the lessee after his assignment resting in privity of contract, that of the assignee resting in privity of estate and continuing only while such privity exists, though he remains, after his assignment to another, liable for breach which he committed while he had the estate. If the assignee hold possession under the lease, or have immediate right to the possession, when any rent falls due, he will continue liable therefor, and will not escape such liability by his subsequent assignment, and this is true whether he become assignee by the act of the lessee or of the lessee's assignee or by act of law, as by purchase at a sheriff's or an owner's sale."¹⁹⁸

¹⁹⁷ *Heller v. Dailey*, 28 Ind. App. 555; 63 N. E. Rep. 490, citing to last proposition *McCall Real Prop.* 95, 96; *Taylor L. & T.*, Sec. 509; *Wood L. and T.*, Secs. 488, 494; 1 Washb. Real Prop. (5th ed.) 579; *Peter v. Barnes*, 16 Ind. 219; *Ross v. Schneider*, 30 Ind. 423.

¹⁹⁸ *Heller v. Dailey*, 28 Ind. App. 555; 63 N. E. Rep. 490; *Fennell v. Guffey*, 139 Pa. St. 341; 20 Atl. Rep. 1048; *Aderhold v. Oil Well Supply Co.*, 158 Pa. St. 401; 28 Atl. Rep. 22; *Edmonds v. Mounsey*, 15

Ind. App. 399; 44 N. E. Rep. 196; *Breckenridge v. Parrott*, 15 Ind. App. 411; 44 N. E. Rep. 66; *Indiana Natural Gas and Oil Co. v. Hinton*, 159 Ind. 395; 64 N. E. Rep. 224; *Washington Natural Gas Co. v. Johnson*, 123 Pa. 576; 16 Atl. 799; *Jackson v. O'Hara*, 183 Pa. 233; 38 Atl. 624.

The lessor may release the lessee on his assigning the lease. *Stallings v. Carpenter*, 162 Ky. 711; 172 S. W. 1063.

¹⁹⁹ *Kleppner v. Lemon*, 29 Pittsb.

§ 103. When work must be begun.

If no time is specified within which the work of development is to be begun, then the law steps in, as we have seen, and requires it to be begun within a reasonable time, and the circumstances of each particular case must determine what would be a reasonable time. For if the premises are surrounded by other oil or gas lands that are being rapidly developed, and thereby in all probability drawing the gas and oil from under the leased premises, the lessee must proceed with greater celerity than if such were not the case; and if the leased premises are only a few acres, so that the chances of losing the oil or gas beneath the surface would be greater than if they were of great or considerable extent, then greater celerity is probably required than in the latter instances.¹⁹⁹ Usually, however, the time within which work is to begin is fixed in the lease, in which case the lessee has the whole time allowed within which to begin the work of development, but no more.²⁰⁰ Thus where thirty days were given within which operations must be begun or the lease be void, work begun upon the premises in good faith upon the afternoon of the

L. J. (N. S.) 346; Daughatee v. Ohio Oil Co., 151 Ill. App. 102; Advance Oil Co. v. Hunt (Ind. App.), 116 N. E. 340; Davis v. Riddle (Colo. App.), 136 Pac. 551; Owens v. Corsicanna Petroleum Co. (Tex. Civ. App.), 169 S. W. 192; Day v. Kansas City Pipe Line Co., 87 Kans. 617; 125 Pac. 43; Smith v. Guffey, 202 Fed. 106; 120 C. C. A. 436.

²⁰⁰ Detlor v. Holland, 57 Ohio St. 492; 49 N. E. Rep. 690; 40 L. R. A. 266; Monfort v. Lanyon Zinc Co., 67 Kan. 310; 72 Pac. Rep. 784; Ringle v. Quigg, 74 Kan. 581; 87 Pac. Rep. 724; Erie Crawford Oil Co. v. Meeks, 40 Ind. App. 156; 81 N. E. Rep. 518.

The lease cannot be extended beyond its terms on the ground that the lessee has failed to find oil. Cook v. Gulf Refining Co., 127 La.

592; 53 So. 874; Hodges v. Brice, 32 Tex. Civ. App. 358; 74 S. W. Rep. 590; Power v. Bridgeport Oil Co., 238 Ill. 397; 87 N. E. Rep. 381; New American Oil, etc., Co. v. Troyer, 166 Ind. 402; 76 N. E. Rep. 255; Mills v. Hartz, 77 Kan. 218; 94 Pac. 142; New American Oil, etc., Co. v. Wolff, 166 Ind. 402; 76 N. E. Rep. 255; Lafayette Gas Co. v. Kelsey, 164 Ind. 563; 74 N. E. Rep. 7; Kellar v. Craig, 126 Fed. Rep. 630; Consumers' Gas Trust Co. v. Littler, 162 Ind. 320; 70 N. E. Rep. 363; Puritan Oil Co. v. Myers, 39 Ind. App. 695; 80 N. E. Rep. 851; Kimball Oil Co. v. Keeton (Ky.), 101 S. W. Rep. 887; 31 Ky. L. Rep. 146; Gillespie v. Fulton Oil Co., 236 Ill. 188; 86 N. E. Rep. 219; Florence Oil, etc., Co. v. Orman, 19 Colo. App. 79; 73 Pac. Rep. 628.

thirtieth day was held to be in time.²⁰¹ The lessee may be required to develop the oil in the land, especially where he controls adjoining lands from which he is taking oil.^{201a} The rule of diligence applies, although no time for commencing operations is specified in the lease.^{201b} Where upon expiration of a gas and oil contract for a term of three years, to be extended so long as gas and oil should be produced in paying quantities, lessees upon consideration were granted an extension of one year's time to develop oil and gas, but failed to commence operations on the first well until within seven days of the expiration of the extended term, lessor has the right to treat the contract as having expired at the end of the year's extension, and it is no excuse for delay that lessees had

²⁰¹ Henderson v. Ferrell, 183 Pa. St. 547; 41 W. N. C. 404; 38 Atl. Rep. 1018; Simon v. Northwestern, etc., Co., 12 Ohio C. C. Rep. 170; 5 Ohio Cir. Dec. 456; Duffield v. Russell, 19 Ohio Cir. Ct. Rep. 266; 10 Ohio C. D. 472; Fleming Oil and Gas Co. v. South Penn. Oil Co., 37 W. Va. 645; 17 S. E. Rep. 203; Elk Fork Oil and Gas Co. v. Jennings, 84 Fed. Rep. 839.

The date of the lease must be excluded in computing the time. Eastern Oil Co. v. Conlehan, 65 W. Va. 531; 64 S. W. Rep. 836.

Whether hauling lumber on the ground the last day is a commencement of the work is a question for the jury. Forney v. Ward (Tex. Civ. App.), 62 S. W. Rep. 108.

What is a reasonable time within which work shall begin is a question of fact, and not of law. Indiana Nat. Gas Co. v. Ganiard, 45 Ind. App. 613; 91 N. E. Rep. 362; Swift v. Occidental M. & P. Co., 141 Cal. 161; 74 Pac. Rep. 700; Federal Betterment Co. v. Blas, 75 Kan. 69; 88 Pac. Rep. 555; Brewster v. Lanyon Zinc Co., 140 Fed. Rep. 801; 72 C. C. A. 213; Buffalo Valley Oil & Gas Co. v. Jones, 75 Kan. 18; 88 Pac. Rep. 537; Day v. Kansas City Pipe Line Co., 87 Kans. 617; 125 Pac. 43.

Where the lease ran for forty years without specifying any time within which development work by the lessee must be commenced, the lessee's failure to do anything to

develop the land for nearly a year and a half was held sufficient to work a forfeiture. Davis v. Riddle (Colo. App.), 136 Pac. 551.

During the "reasonable time" for development the same protection is given to the lessee in law and equity as is to one whose prospecting time is fixed in the lease. Smith v. Guffey, 202 Fed. 106, 120 C. C. A. 436.

The owners of several tracts jointly leased them for a gross sum, without stipulating the amount due each, and stipulated that drilling should begin within one year. It is held that the commencement of one well was sufficient; and the lessee did not have to begin a well on each tract within a year. Nabors v. Producers Oil Co., 140 La. 985; 74 So. 527; L. R. A. 1917 D 1115.

Where the assignee of three oil and gas leases covering separate tracts in F. Township entered into a subsequent agreement with the lessor "to drill a third well on his land in F. Township," the liability of the assignee under such subsequent contract could be fixed by proof that he failed to drill a well upon any other lands described in the leases. Indiana Natural Gas & Oil Co. v. Duling, 51 Ind. App. 596; 100 N. E. 96.

^{201a} Power v. Bridgeport Oil Co., 238 Ill. 397; 87 N. E. Rep. 381.

^{201b} Logan Nat. Gas & F. Co. v. Great Southern Gas Co., 126 Fed. Rep. 623.

made arrangements with a contractor to commence drilling operations in sufficient time to complete the well before expiration of the extended time, but, on account of an accident to his apparatus, he forced them to contract with another operator unable to begin operations until too late to complete the well in time.^{201c} Where a person, at the time he sank an oil well on a certain tract of land in controversy in good faith believed he had title thereto, and by the expenditure of \$11,000 produced oil of the value of \$29,563.85, before his right to the land was determined against him, it was held that he was entitled to reimbursement to the amount expended in improvements out of the proceeds of the oil.^{201d}

§ 104. Diligence in operating leased premises after development.

Every gas or oil lease contains an implied covenant that the lessee will use reasonable diligence in operating the premises after they have been developed. One can readily see that a lessee, after he has developed the premises, may work them in so leisurely a way as to be of little profit to the lessor, and that the latter may suffer a serious damage by reason of the conduct of the lessee. It will not do to say that the lessee has such an interest in the working of the premises as it is to his advantage to work them diligently; for his interests may be adverse to those of the lessor—as, for instance, he may take leases at a lower rental or royalty on the adjoining premises whereby he can drain the premises first leased. A failure, therefore, to work the premises diligently will subject the lessee to an action for damages.^{201e} And an express covenant to work the premises diligently may bring about a forfeiture of the lease, if they are not so worked.²⁰² In the case of a coal mine, it cannot be in-

^{201c} Hollister v. Vandergrift, 30 Ohio Cir. Ct. Rep. 759.

^{201d} Gilmore v. O'Neil (Tex. Civ. App.), 139 S. W. 1162.

^{201e} Steele v. American, etc., Co. (W. Va.), 92 S. E. 410 (all lessors must join in action); Fisher v. Crescent Oil Co. (Tex. Civ. App.), 178 S. W. 905; Daughtee v. Ohio Oil Co., 263 Ill. 518; 105 N. E. 308; affirming 181 Ill. App. 135; Brown v. Producers Oil Co., 134 La. 701;

64 So. 684; Indiana Oil, etc., Co. v. McCrory, 42 Okl. 136; 140 Pac. 610; Culbertson v. Iola, etc., Co., 87 Kans. 529; 125 Pac. 81; Grass v. Big Creek, etc., Co., 75 W. Va. 719; 84 S. E. 750; Highfield Co. v. Kirk, 248 Penn. 19; 93 Atl. 815; Owens v. Corsicanna, etc., Co. (Tex. Civ. App.), 169 S. W. 192.

²⁰² Kock's Appeal, 93 Pa. St. 434; Elk Fork Oil and Gas Co. v. Jennings, 84 Fed. Rep. 839; Kleppner

ferred, from an agreement to carry on mining operations in a safe, skilful and workmanlike manner that there is a covenant to work the mine continuously.²⁰³ The judgment of the operator as to the diligence required in the operations under the lease controls, where he acts in good faith, and not arbitrarily to promote his own interests to the prejudice of the lessor.^{203a} If

v. Lemon, 176 Pa. St. 502; 35 Atl. Rep. 109; Barnsdall v. Boley, 119 Fed. Rep. 191; Harris v. Ohio Oil Co., 57 Ohio St. 629; 50 N. E. Rep. 1129; Glasgow v. Chartiers Oil Co., 152 Pa. St. 48; 25 Atl. Rep. 232; Parish Fork Oil Co. v. Bridgewater Gas Co., 51 W. Va. 583; 42 S. E. Rep. 655; 59 L. R. A. 566; McNight v. Mfg. Natural Gas Co., 146 Pa. St. 185; 23 Atl. Rep. 164; 28 L. R. A. 790; Core v. N. Y., etc., Co., 52 W. Va. 276; 43 S. E. Rep. 128; Edwards v. Iola Gas Co., 65 Kan. 362; 69 Pac. Rep. 350; Beatty-Nickel Oil Co. v. Smethers, 49 Ind. App. 602; 96 N. E. 19; Daughtee v. Ohio Oil Co., 151 Ill. App. 102 (burden to show diligence); Gadberry v. Ohio, etc., Co., 162 Ind. 9; 67 N. E. 259; 62 L. R. A. 895; Doddridge Oil & Gas Co. v. Smith, 154 Fed. 970; Allegheny Oil Co. v. Snyder, 45 C. C. A. 604; 106 Fed. 764; Brewster v. Lanyon Zinc Co., 140 Fed. Rep. 801; 72 C. C. A. 213; Acme Oil, etc., Co. v. Williams, 140 Cal. 681; 74 Pac. Rep. 296; Ilowerton v. Kansas Nat. Gas Co., 82 Kan. 567; 108 Pac. Rep. 813; reversing 81 Kan. 553; 106 Pac. Rep. 47; 34 L. R. A. (N. S.) 34; Cherokee Const. Co. v. Bishop, 86 Ark. 489; 112 S. W. Rep. 189; Tucker v. Watts, 25 Ohio Cir. Ct. Rep. 320.

The lessee of oil land agreed to properly develop the land and to give the lessor a specified royalty. Subsequently a new agreement was entered into between the lessor and lessee providing for the operation of the only well on the property (naming it), and limiting the output to less than one-sixth of the well's capacity, on account of the low price and inadequate storing facilities. It was held that, though the instrument referred to the one well, it was intended to limit the production from the whole of the leased property, and the lessor

waived her right to require the lessee to produce a larger amount therefrom in the absence of conditions rendering it necessary for the protection of the lease from drainage by wells on adjoining tracts. *J. M. Guffey Petroleum Co. v. Jeff Chaison Townsite Co.* (Tex. Civ. App.), 107 S. W. 609.

²⁰³ *McIntyre v. McIntyre Coal Co.*, 105 N. Y. 264.

Whether a lessee had used reasonable diligence in developing land and marketing the product within the terms of his lease is a question for the jury. *Buffalo Valley Oil & Gas Co. v. Jones*, 75 Kan. 18; 88 Pac. Rep. 537.

In an action against a lessee of oil lands, though a charge requiring of it the exercise of "business-like diligence" in developing the land, and that it should have acted as a "prudent business-like man," may not be calculated to give the jury an erroneous idea as to the degree of diligence and care required of the lessee, the use in a charge of expressions to designate ordinary care which differ from the well-established definitions is to be condemned. *J. M. Guffey Petroleum Co. v. Jeff Chaison Townsite Co.* (Tex. Civ. App.), 107 S. W. 609.

A right vested in an oil and gas lessee by discovery to produce oil or gas in an upper sand is not lost if the lessee continues to drill deeper in search for oil or gas in a lower sand, though he does not find oil in the lower sand within the time prescribed in the lease; but, if oil or gas is not found in the lower sand, production from the upper sand cannot be long deferred without incurring the penalty of abandonment or forfeiture. *Eastern Oil Co. v. Coulehan*, 65 W. Va. 531; 64 S. E. 836.

^{203a} *Grass v. Big Creek, etc., Co.*, 75 W. Va. 719; 84 S. E. 750; *Steele*

the operator has used reasonable diligence in his operations, the lessor cannot recover damages for alleged failure to properly operate under the lease.^{203b} The operator cannot shield himself under the plea that he acted in good faith if in fact he did not act as a reasonable prudent man would have done in determining the extent to which he would develop the premises.^{203c} Where the object contemplated is to obtain a profit, both the lessor and the lessee are bound for that degree of diligence required by the particular circumstance.^{203d} Where the object contemplated by the lease is to obtain a profit for both lessor and lessee neither is, in the absence of a stipulation to that effect, the arbiter of the extent to which the operation shall proceed.^{203e}

§ 105. Agreement as to what constitutes due diligence.

The lessor and lessee may agree concerning what shall constitute due diligence, in which event they will be bound by the agreement, whether the degree of diligence constitute due diligence or not. In that event a purchaser from the lessor, even without notice of the special agreement, but with a knowledge of the existence of the lease, will be bound by such agreement.²⁰⁴

§ 106. Unprofitable lease.

Where the lessor is to receive a part of the profits, or even a part of the product as a royalty, the lessee is not bound to operate the premises at a loss, and may abandon them.²⁰⁵ And

v. American Oil, etc., Co. (W. Va.),
92 S. E. 410.

^{203b} Grass v. Big Creek, etc., Co.,
75 W. Va. 719; 84 S. E. 750.

^{203c} Daughetee v. Ohio Oil Co.,
263 Ill. 518; 105 N. E. 308; affirm-
ing 181 Ill. App. 135.

^{203d} Jennings v. Southern Carbon
Co., 73 W. Va. 215; 80 S. E. 368;
Indiana Oil, etc., Co. v. McCrory,
42 Okl. 136; 140 Pac. 610.

^{203e} Paraffine Oil Co. v. Cruce
(Okl.), 162 Pac. 716.

²⁰⁴ Bartley v. Phillips, 179 Pa. St.
175; 36 Atl. Rep. 217; Ringle v.
Quigg, 74 Kan. 581; 87 Pac. Rep.
724; Brewster v. Lanyon Zinc Co.,
140 Fed. Rep. 801; 72 C. C. A. 213;
Indiana Nat. Gas & Oil Co. v. Grain-
ger, 33 Ind. App. 559; 70 N. E. Rep.
395; Aye v. Philadelphia Co., 193
Pa. 451; 44 Atl. 555.

²⁰⁵ Bradford Oil Co. v. Blair, 113
Pa. St. 83; 4 Atl. Rep. 218; Adams
v. Stage, 18 Pa. Super Ct. Rep.
308.

the honest opinion of the lessee, that the lease cannot be operated profitably, is entitled to more weight than the opinion of the lessor, of experts, of the judge who tries the case, or of all combined.²⁰⁶ If no rent has been agreed upon, to be paid the lessor if operations are not carried on, under an agreement giving the lessee (so called) all right, title and interest in the oil, such lessee is liable only for nominal damages.²⁰⁷ If the lease sets forth the number of wells that must be drilled, the lessee is not required to drill more than the number in order to make the lease profitable.²⁰⁸ He is not bound to put down a well that would be unprofitable, unless he has expressly agreed to do so.²⁰⁹

§ 107. Lessor cannot impair value of lease by drilling wells on his own land.

As a general proposition, a lessor cannot drill wells on his own lands so close to the premises he has demised as to seriously impair the value of the latter, by extracting the oil or gas from them. Not infrequently a protecting territory of a certain width surrounding the leased premises, where it is wholly or in part bounded by the lessor's lands, is provided for in the lease, within which neither the lessor nor the lessee may operate. A rather anomalous case on this question arose in Pennsylvania. In that instance a lease of less than four acres was taken, with "a protection of ten rods on the east side" of the lot "and eight rods on the north side." This "protection," so far as the part in dispute was concerned, made a rectangle on the northeast corner of the lease eighty rods square.

²⁰⁶ *Young v. Forest Oil Co.*, 194 Pa. St. 243; 45 Atl. Rep. 121; 30 Pittsb. L. J. (N. S.) 221; *Glasgow v. Chartiers Oil Co.*, 152 Pa. St. 48; 25 Atl. Rep. 232; affirming 23 Pittsb. L. J. (N. S.) 146; *Snodgrass v. South Pa. Oil Co.*, 47 W. Va. 509; 35 S. E. Rep. 820; *Lowther Oil Co. v. Miller-Sibley Oil Co.*, 53 W. Va. 501; 44 S. E. Rep. 433; 97 Am. St. 1027.

²⁰⁷ *Chamberlain v. Parker*, 40 N. Y. 569.

²⁰⁸ *Colgan v. Forest Oil Co.*, 194 Pa. St. 234; 45 Atl. Rep. 119;

30 Pittsb. L. J. (N. S.) 68; 75 Am. St. Rep. 695; *Stoddard v. Emery*, 128 Pa. St. 436; 24 W. N. C. 566; 18 Atl. Rep. 339; *Stahl v. Illinois Oil Co.*, 45 Ind. App. 211; 90 N. E. Rep. 632; *Ramage v. Wilson*, 45 Ind. App. 599; 88 N. E. Rep. 862.

²⁰⁹ *Adams v. Stage*, 18 Pa. Super. Ct. Rep. 308; *Venture Oil Co. v. Fretts*, 152 Pa. St. 451; 25 Atl. Rep. 732; *Steelsmith v. Gartlan*, 45 W. Va. 27; 29 S. E. Rep. 978; 44 L. R. A. 107.

In strict sense, this left a square of eight by ten rods between the east and north "protections"; and in this square the lessee sought to drill a well. This the court held he could not do, and in discussing the question used the following language:

"If the stipulation in the lease, on which the right to the injunction depends, is to be strictly construed according to the literal meaning of the language, the defendant's well cannot be regarded as within the protection for which it provides, and if so, the plaintiffs have no legal or equitable right to the relief asked for in the bill. But the agreement must be construed with reference to the subject matter, and so as to effectuate, if possible, the purpose for which it was intended. The lease was 'for the sole and only purpose of mining and excavating for petroleum, coal, rock or carbon oil' in the tract described therein. The parties probably knew that, if oil was found in the demised premises, a well bored within a short distance would draw off more or less of the oil, and that for the same reason a well on the border or side of the tract would draw part of its supply from the adjoining ground. The object of the agreement was, therefore, twofold: To prevent the lessor or any one under him from mining or boring wells within eight rods of the north and ten rods of the east line of the tract described in the lease and to give the lessees more ground for the supply of any wells they might drill or bore on the demised premises in proximity to these lines.' Is it then a reasonable supposition that the parties intended to leave a gap at the corner where these lines intersect which would render the 'protection' valueless and defeat the purpose for which it was intended? The master and the court below were of the opinion that it was the intention of the parties to secure the same protection to the corner as to the sides of the demised tract, and that the agreement should be so construed as to carry out their intention. This, as it seems to us, is its reasonable interpretation; and, if so, the defendants had no right to construct buildings, machinery, and to put down a well within a few feet of the corner of the plaintiff's leasehold, and pump therefrom, as they did, large quantities of oil. Nor can there be a doubt that the plaintiffs have a sufficient title to enable them to obtain

redress by injunction of the wrong done by the defendants. The trespass of which they complain is of a permanent nature, and, under the facts found by the master, destructive of their leasehold. It is clear, then, that under the equitable powers conferred by the statute, the court below had jurisdiction for its prevention or restraint."²¹⁰

Where the lease provided that no wells should be drilled within three hundred yards of a certain building, and there was a reservation of the surface for tillage; it was held that the land within this three hundred yards could not be leased by the owner to a third party to drill wells upon; for the lessee had a right to draw all the oil from beneath its surface that he could by wells sunk in that portion of the tract, of which the three hundred yards was a part, where he had a right to drill them.²¹¹

§ 108. Lessee draining premises by operations on adjoining territory.(a)

A lessee must act in good faith in the operation of the leased premises. He cannot under the guise of ownership of the adjoining premises drain the lands he has leased by sinking wells on such premises, under the claim of a right to do so, and not put down a sufficient number of wells on the leased territory as will protect it from the wells operated on such adjoining terri-

²¹⁰ Allison's Appeal, 77 Pa. St. 221.

²¹¹ Westmoreland, etc., Co. v. DeWitt, 130 Pa. St. 235; 18 Atl. Rep. 724; 29 Amer. L. Reg. 93; 5 L. R. A. 731; Lynch v. Burford, 201 Pa. 52; 50 Atl. Rep. 228.

The intention of the parties being clearly expressed in a covenant to prohibit the drilling of oil and gas wells on a certain tract in all deeds for the conveyance of any and all portions thereof will not be enlarged by implication to include the prohibition in a lease on said tract. West Oil Co. v. La Tourette, 19 Okl. 214; 91 P. 1025.

The use of pumps to pump the gas to a distant city, does not violate the rights of land proprietors whose lands adjoin the leased property, at least so long as the pumps simply push the gas in the mains to the consumer or the company's reservoir, and not cause the gas to flow from the well in greater quantities than it would if the well were left open and the gas permitted to escape, unobstructed, into the atmosphere. Richmond, etc., Gas Co. v. Enterprise, etc., Gas Co., 31 Ind. App. 222; 66 N. E. Rep. 782; Consumers' Gas Trust Co. v. American Plate Glass Co., 162 Ind. 393; 68 N. E. 1020.

(a) § 882.

tory, when the lessor, at least, receives his compensation by a royalty on or a part of the oil produced, or by a rental of so much per producing well. Of course, if the lessor receives a lump sum per annum for the ground, or so much per acre per annum, then it is immaterial to him whether his premises are developed or not; and the lessee may conduct operations on the adjoining territory, even though he drain the leased premises entirely of their oil and gas. Where an operator obtained leases of two adjoining farms, and placed a well on one of them, so close to the line between them as to drain both farms alike, and failed to sink a well on the other farm to offset the well he had already drilled on the first farm, it was held that the owner of such other farm was entitled to damages; and in estimating the damages the oil actually extracted will be considered in the same way as where an owner wrongfully mingles and confuses his own goods with another's.²¹² And if the lessee refuse to develop such other farm, within a reasonable time, the court may decree a forfeiture of the lease of it, or of so much of it as remains undeveloped.²¹³

²¹² *Kleppner v. Lemon*, 29 Pittsb. L. J. 346; *Beatty-Nickle Oil Co. v. Smethers*, 49 Ind. App. 602; 96 N. E. 19; *Barnard v. Monongahela Nat. Gas Co.*, 216 Pa. 362; 65 Atl. Rep. 801; *Powers v. Bridgeport Oil Co.*, 238 Ill. 397; 87 N. E. 381. See also *J. M. Guffey Petroleum Co. v. Jeff Chaison Townsite Co.*, Tex. Civ. App., 107 S. W. Rep. 609.

In such an instance trespass on the case lies in favor of the lessor. *Steele v. American, etc., Co.* (W. Va.), 92 S. E. 413.

A gas lease providing for royalties and not specifying the number of wells to be drilled, requires the lessee to develop the land with reasonable diligence, and entitles the lessor, at least to royalties on the gas taken by the lessee through wells on adjoining lands. *Culbertson v. Iola, etc., Co.*, 87 Kans. 539; 125 Pac. 81; Ann. Cas. 1914 A 610, quoting this section.

²¹³ *Kleppner v. Lemon*, 176 Pa. St. 502; 35 Atl. Rep. 109. See *Henne v. South Penn. Oil Co.*, 52 W. Va. 192; 43 S. E. Rep. 147; *Powers v. Bridgeport Oil Co.*, 238 Ill. 397; 87 N. E. 381.

A covenant in an oil and gas lease that the first parties agree that they will in any deed hereafter executed by them or either of them for any part of a certain addition, prohibit any drilling for oil or gas on any land so hereafter conveyed in said addition, under the general usage and acceptance of the term "deed," a lease is not included, and there is no prohibition against leasing the tract for the purpose of drilling oil and gas wells. *Test Oil Co. v. La Tourette*, 19 Okl. 214; 91 P. 1025.

In the absence of special circumstances or relations, drilling a well and operating a lease by the lessee near the division line whereby oil

§ 109. Drilling well near boundary line.(a)

By drilling a well close to the boundary line of his land the owner may not only drain the oil or gas from his own territory, but from that of his adjoining neighbor. This is easily perceived in instances of drilling wells on ordinary town lots, which are often only thirty or forty feet wide and three or four times as long. It is quite obvious in such an instance one well may drain the oil or gas from under several or even many lots. And yet, who has the right to say the owner of a lot may not put down a well on it, for fear, or from the fact, he may get the oil or gas, or a part of it, under his neighbor's lot? His neighbor has the power to protect his interests, by sinking a well on his own lot; and if he does not see fit to do so, he has no right to prevent another and adjoining lot owner from developing his own territory. He cannot play, as it were, the "dog in the manger" policy. Of course, the same is true of larger tracts, —tracts of even hundreds of acres. One landowner may not deprive another and adjoining one of the right to drill a well on his own land wherever he wills. If his neighbor put a well within a few feet of his boundary line, then he may put a well immediately opposite and just within the line on his own land, although he must necessarily draw oil or gas from his neighbor's soil. This is his protection.²¹⁴ The adjoining land-

is drained from adjoining land, will not afford a basis for a claim to a share in, and an accounting for, the oil so produced, nor for a receivership therefor. *Gain v. South Penn. Oil Co.*, 76 W. Va. 769; 88 S. E. 883; L. R. A. 1916 B 1002.

Where gas found in the sands penetrated on the leased premises, was run into a line from wells on an adjoining leased premises operated by the same lessee in operating the wells on both properties, was held not to render the lessee liable for

annual gas rentals under the lease. *Prieherd v. Freeland Oil Co.*, 75 W. Va. 450; 84 S. E. 945; L. R. A. 1915, D1186.

(a) § 882.

²¹⁴ *Kelly v. Ohio Oil Co.*, 57 Ohio St. 317; 49 N. E. Rep. 399; 39 L. R. A. 765; 63 Am. St. Rep. 721; 9 Ohio C. Ct. Rep. 511; 38 Wkly. L. Bull. 299; 39 Wkly. L. Bull. 54; *People's Gas Co. v. Tyner*, 131 Ind. 277; 31 N. E. Rep. 59; 16 L. R. A. 443; *Westmoreland, etc., Gas Co. v. DeWitt*, 130 Pa. St. 235; 18 Atl.

owner may even increase the flow of gas on his own premises by shooting his wells, although it will have the effect to draw gas from his neighbor's adjoining territory.²¹⁵ But if a man through mere malice, in order to injure his neighbor's gas well, sink a well on his own land, and it has that effect, then he will be liable to an action for damages brought against him by the injured person.²¹⁶ A statute that prohibits drilling within a certain distance of the boundary line is constitutional.²¹⁷ Landowners may agree that they will not drill within a certain distance of the boundary line between them; and for a violation of the agreement, a court of equity will enjoin the one in fault. The mutual protection is a sufficient consideration to uphold the contract.²¹⁸ Where a lease was subject to a reservation as follows: "Land surrounding farm buildings and marked by stakes, and as a protection against fire," it was held that the landowner had no right to drill an oil well, and take the oil, upon this reservation.^{218a} In the usual lease there is no implied covenant by the lessee to protect the leased premises against damage through flowing wells on adjacent lands by drilling offset wells, which is effective within the time for which the lessor has accepted a consideration in lieu of development.^{218b}

Rep. 724; 29 Amer. L. Reg. 93; 5 L. R. A. 731; *Hague v. Wheeler*, 157 Pa. St. 324; 27 Atl. Rep. 714; 22 L. R. A. 141; *Rumsey v. Sullivan*, 166 N. Y. App. Div. 246; 150 N. Y. Supp. 287; affirming judgment on rehearing, 164 N. Y. App. Div. 911; 148 N. Y. Supp. 1142.

²¹⁵ *People's Gas Co. v. Tyner*, *supra*.

²¹⁶ *Dietum in Hague v. Wheeler*, *supra*.

If a landowner have ample remedy otherwise, an injunction will not lie to protect his interests. *Ers- kine v. Forest Oil Co.*, 80 Fed. Rep. 583.

²¹⁷ *Maple v. John*, 42 W. Va. 30; 24 S. E. Rep. 608; 32 L. R. A. 800.

²¹⁸ *Ware v. Langmade*, 9 Ohio C

Ct. Rep. 85; 6 Ohio C. Dec. 43; 2 Ohio Dec. 116.

Pumping gas after it has reached the gas mains, where the flow from the well is not rendered greater than it would be if the well was left open, is not such a violation of the rights of a landowner whose land adjoins such well, as will entitle him to an injunction or to damages. *Richmond, etc., Gas Co. v. Enterprise, etc., Gas Co.*, 31 Ind. App. 222; 66 N. E. Rep. 782; *Consumers' Trust Co. v. American Plate Glass Co.*, 162 Ind. 393; 68 N. E. Rep. 1020.

^{218a} *Lynch v. Burford*, 201 Pa. 52; 50 Atl. Rep. 228.

^{218b} *Stanley v. United Fuel Gas Co. (W. Va.)*, 90 S. E. 344. And

§ 110. Injunction.—Quieting title.

Injunction lies to protect the rights of a lessee in the leased territory.^{218c} He may enjoin anyone sinking a well in them, even the lessor, and is not compelled to resort to an action for damages.²¹⁹ A person holding a valid executory lease, executed by the landowner or by several of a number of co-tenants, has such an interest, although inchoate in the land, as will enable him to maintain an injunction to prevent a wrongdoer from committing waste by the extraction of oil and gas; and it makes no difference that he has not yet perfected his own right to explore.²²⁰ A lessee in possession may maintain a suit in equity

it would seem that at no time is the lessee bound to drill offset wells. *Caper v. United Fuel Gas Co.* (W. Va.), 89 S. E. 12.

In a suit to enjoin the operation of a gasoline plant on land held under an oil and gas lease, it was held error to exclude evidence that the defendants were operating the plant to extract gasoline from oil piped from adjoining properties. *Bubb v. Parker, etc., Oil Co.*, 252 Penn. 26; 97 Atl. 114.

^{218c} *Chandler v. Hart*, 161 Cal. 405; 119 Pac. 516; *Barnsdoll Oil Co. v. Leahy*, 195 Fed. 731; *Mexico-Wyoming, etc., Co. v. Valentine*, 237 Fed. 538; *Guffey v. Smith*, 237 U. S. 101; 35 Sup. Ct. 237; 59 L. Ed. 856.

A wife by reason of her inchoate right of dower is not entitled to enjoin her husband's grantee in her husband's lifetime from drilling for oil and gas and removing and selling them. *Rumsey v. Sullivan*, 166 N. Y. App. Div. 245; 150 N. Y. Sup. 287; affirming judgment on rehearing, 164 N. Y. App. Div. 911; 148 N. Y. Sup. 1142.

²¹⁹ *Duffield v. Hue*, 136 Pa. St. 602; 20 Atl. Rep. 526; *Bettman v. Harness*, 42 W. Va. 443; 26 S. E. Rep. 271; 36 L. R. A. 566; *Citizens'*

Natural Gas Co. v. Shenango, etc., Co., 138 Pa. St. 22; 20 Atl. Rep. 947; *Smith v. Root*, 66 W. Va. 633; 66 S. E. Rep. 1005; 30 L. R. A. (N. S.) 1006; *Midland Oil Co. v. Turner*, 179 Fed. Rep. 74 (modifying *Turner v. Seep*, 167 Fed. Rep. 646); *Seep v. Spade*, 179 Fed. Rep. 77; *Gillespie v. Fulton Oil & Gas Co.*, 239 Ill. 326; 88 N. E. Rep. 192. § 891, note 6; § 921, note 104.

A stipulation in a lease for five years, and as much longer as oil shall be found in paying qualities, which gives to the lessee, on payment of \$1.00, the right to surrender the lease for cancellation thereafter accruing under the lease, deprives the lessee of the right to enjoin a violation of the lease by the lessor. *Ulrey v. Keith*, 237 Ill. 284; 86 N. E. Rep. 696.

²²⁰ *Trees v. Eclipse Oil Co.*, 47 W. Va. 107; 34 S. E. Rep. 933; *Allison's Appeal*, 77 Pa. St. 221; *Natural Gas Co. v. Philadelphia Co.*, 158 Pa. St. 317; 27 Atl. Rep. 951; *Allegheny Oil Co. v. Snyder*, 106 Fed. Rep. 764; 45 C. C. A. 604 (by statute); *Whitmore v. Heeter*, 58 Penn. Super. Ct. 342; *United States v. McCutchen*, 234 Fed. 702; *Campbell*, 180 Ind. 159; 101 N. E. 89.

against persons claiming under leases from the lessor to other persons, and may have their leases declared a cloud upon his title.²²¹ A preliminary injunction will be awarded against a lessor where he has made a re-entry under a claim of forfeiture and the claim is disputed on every ground on which he puts it.²²² The court, in such an instance will not only enjoin the lessor, but it will compel him to restore the premises to the condition he found them in when he re-entered upon them, even to the extent of compelling him to restore gas pipe lines he has severed, until hearing.²²³ But the court should not go too far in the preliminary injunction; it being sufficient, as a rule, to preserve the present condition until final hearing, unless gas or oil in considerable quantities will be lost if further steps be not taken.²²⁴ The owner of the land or the lessee may enjoin a stranger who is threatening to put down an oil or gas well. "An action for damages would have been inadequate, since the damages could not be measured. . . . How much the flow

²²¹ *Elk Fork Oil and Gas Co. v. Jennings*, 84 Fed. Rep. 839. See *Erskine v. Forest Oil Co.*, 80 Fed. Rep. 583.

A lessee under an oil and gas lease, although out of possession, may maintain a suit in equity in a federal court to protect his rights thereunder by enjoining the removal of oil or gas from the premises by a claimant under another lease, the effect of which would be to destroy his estate, and, having acquired jurisdiction for that purpose, the court may retain it to settle the question of title as between the parties, and to cancel defendant's lease as a cloud on complainant's title. *Logan Natural Gas & Fuel Co. v. Great Southern Gas & Oil Co.*, 126 Fed. 623.

A bill to quiet title in complainant to an oil claim under the placer mining laws which alleges that defendants have entered upon the ground, and have extracted and re-

moved oil therefrom, and are engaged in sinking a well thereon, and which asks an injunction to restrain them from proceeding with such work, and from taking and removing oil, is, in effect, a bill to obtain possession, and admits the possession of defendants; hence it is not cognizable by a federal court of equity, the remedy being at law. *California Oil & Gas Co. of Arizona v. Miller*, 96 Fed. 12.

²²² *Poterie Gas Co. v. Poterie*, 153 Pa. St. 10; 25 Atl. Rep. 1107; *Duffield v. Rosenzweig*, 144 Pa. St. 520; 23 Atl. Rep. 4.

²²³ *Poterie Gas Co. v. Poterie*, 179 Pa. St. 68; 36 Atl. Rep. 232; *Buskirk v. King*, 72 Fed. Rep. 22. See *Black Lick Co. v. Saltsburg Gas Co.*, 139 Pa. St. 448; 21 Atl. Rep. 432.

²²⁴ *Bettman v. Harness*, 42 W. Va. 433; 26 S. E. Rep. 271; 36 L. R. A. 566.

of appellant's well would have been diminished could not be determined; the damages could not be measured in money."²²⁵ If the lease has expired, the lessor may maintain an action to enjoin the lessee operating under it.^{225a} If the lessee has made an honest attempt to complete a first well within the time specified in the lease, although not such excusable delay as to extend the lease upon the whole premises, equity will permit its completion for the purpose of ascertaining the results of the work, and apportion the costs between the parties.^{225b} A landowner with so clear a title as not to require a resort to a jury trial may enjoin the extraction of gas by one who has no right to it; and if the bill sets out such title, it need not allege the pendency of an action at law to try the question of title, nor an intention on the part of the plaintiff to institute such an action.^{225c}

§ 111. Damages.(a)

A failure to develop the leased premises may render the lessee liable to the lessor to an action for the recovery of damages; and usually the lessee cannot set up as a defense that it was purely optional with him to develop such premises. Thus where a lease required the payment of a royalty and a sum of money,

²²⁵ *Indianapolis Natural Gas Co. v. Kibbey*, 135 Ind. 357; 35 N. E. Rep. 392. See *Thomas v. Marble*, etc., Co., 58 Fed. Rep. 485; and *Consumers' Trust Co. v. American Plate Glass Co.*, 162 Ind. 393; 68 N. E. Rep. 1020; *Indiana Nat. Gas & Oil Co. v. Wilhelm*, 44 Ind. App. 100; 86 N. E. Rep. 86.

^{225a} *Meek v. Cooney*, 26 Ohio Cir. Ct. Rep. 553; *Hollister v. Vandergrift*, 30 Ohio Cir. Ct. Rep. 759.

^{225b} *Hollister v. Vandergrift*, *supra*.

In Illinois it is held that the bill for an injunction must set forth facts tending to show that the injury is irreparable and that the defendant is not able to respond to any judgment of law which might be obtained against him. *Chohot v. Laznovski*, 183 Ill. App. 203; which in Indiana is not necessary. *Campbell v. Smith*, 180 Ind. 159; 101 N. E. 89.

In a suit to enjoin the operation of a gas line plant on land held under an oil and gas lease, it was held error to exclude evidence that the defendants were operating the plant to extract gasoline from oil piped from the adjoining property. *Bubb v. Parker, etc., Oil Co.*, 252 Penn. 26; 97 Atl. 114.

If the lease is executed by a husband and wife, and the royalty is

payable to them jointly, the wife is a necessary party in an action to enjoin the lessee from drilling, even though the lease, if properly reformed, would have expired. *Coffman v. Hope, etc., Gas Co.*, 74 W. Va. 67; 81 S. E. 575.

In a proper case an injunction may be granted to prevent a violation of a lease; but not where only nominal damages can be recovered. *Advance Oil Co. v. Hunt* (Ind. App.), 116 N. E. 340.

In a suit by a lessee of oil land to enjoin operations thereon by a later lessee, evidence offered by defendant to show the large increase in the value of the land, due to its development of the same, to affect complainant's equities, was properly excluded, where at the time of such development, defendant had actual knowledge of complainant's lease. *Mexico-Wyoming Petroleum Co. v. Valentine*, 237 Fed. Rep. 538.

^{225c} *Columbia Gas & El. Co. v. Moore* (W. Va.), 93 S. E. 1051.

Lessee may maintain ejectment, *Beatty Oil & Gas Co. v. Blanton*, 245 Fed. 979, following *Barnsdall v. Bradford Gas Co.*, 225 Pa. 338; 74 Atl. 207; 26 L. R. A. (N. S.) 614, and denying *Lindlay v. Raydure*, 239 Fed. 928, 938.

(a) § 875.

operations to begin and a well to be completed within fixed periods of time, containing a clause that on failure to comply the lessee should pay a fixed sum per annum during such delay, and another clause that a failure to comply with or make the annual payment within the time mentioned the lease should be void; it was held that a failure to both commence operations and to make the payments within the agreed time did not render the lease null and void, but it only became such from the expiration of the time within which the payment was to be made, and therefore the lessee was liable for damages sustained by his breach of the covenants.²²⁶ But where the lease was conditioned to be void unless the lessee should do something in the way of development by putting down a well within a certain time, or pay so much money per month, yet contained no covenant to do either; it was held that such lessee was not liable in damages for a failure to perform the conditions named.²²⁷ A failure to sink a sufficient number of wells to develop the territory will render the lessee liable to an action for damages.²²⁸ Where only a part of the land is developed, the implied covenant to develop it all is no ground of forfeiture, but the lessee is liable for damages for a failure to comply with the covenant.²²⁹ The fact that there is a clause in the lease giving the lessee a right to surrender the premises will not defeat his right to an injunction in the Federal Courts.^{229a} By a grant of a lease the lessor impliedly covenants that he has a good title to the leased premises. If he has not, and the lessee is evicted by the persons holding the superior title, the lessor can recover neither the royalties to be paid nor damages for a failure to develop the premises; for the royalties do not belong to the lessor and he has suffered no damage because of a failure to drill wells and produce gas or oil. The lessee need not be actually evicted in order to defend; a constructive eviction is sufficient. If the rights of the lessee have been determined not to exist in an action brought by the owner of the land, then the lessee has the burden to prove that the paramount title is in the one who brought the suit to quiet the title, and not the lessor; but if the lessor was made a defendant in the action to quiet title, then the lessee need go no further than show the bringing of the action and the result. If the lessee

²²⁶ *Galey v. Kellerman*, 123 Pa. St. 491; 23 W. N. C. 139; 16 Atl. Rep. 474; *Kleppner v. Lemon*, 29 Pittsb. L. J. (N. S.) 346.

²²⁷ *Glasgow v. Chartiers Gas Co.*, 152 Pa. St. 48; 31 W. N. C. 207; 25 Atl. Rep. 232; distinguishing *Ray v. Gas Co.*, 138 Pa. St. 576; 20 Atl. Rep. 1065; *Cochran v. Gulf, etc., Co.*, 139 La. 1010; 72 So. 718; *McCombes v. Kellerman*, 162 Cal. 749; 124 Pac. 431.

²²⁸ *Harness v. Eastern Oil Co.*, 49 W. Va. 232; 38 S. E. Rep. 662.

The remedy is not by a suit in equity for a forfeiture of the lease, but by an action for damages for its breach. *Kellar v. Craig*, 126 Fed. Rep. 630; *Doddridge County Oil & Gas Co. v. Smith*, 154 Fed. Rep. 970.

²²⁹ *Harris v. Ohio Coal Co.*, 57 Ohio St. 118; 48 N. E. Rep. 502.

^{229a} *Gulley v. Smith*, 237 U. S. 101; 35 Sup. 526; 59 L. Ed. 856; reversing 202 Fed. 106; 120 C. C. A. 436. See § 136; *Shaffer v. Marks*, 241 Fed. 139.

bring an action against his lessor for damages because of a failure of title, and the superior title is set forth in the complaint, an averment of a demand for possession is not necessary. When the lessee is sued by the person holding the paramount title he is under no obligation to notify his lessor unless he desires to bind him by the result of the litigation.^{229b}

§ 112. Damages for failure to keep covenant.—Measures.(a)

Instead of declaring a forfeiture, the lessor may elect to bring an action for a failure to keep or perform the covenant broken; and he may recover either on an express or an implied covenant. For the breach of an implied covenant to reasonably operate a mine, or oil or gas lease he has a cause of action. If there has been a breach of an express covenant in part only he cannot declare a forfeiture, where the forfeiture is for a breach of the entire covenant. His remedy in such an instance is an action for damages.²³⁰ If the lease provide the amount of recovery, that will be the measure of damages; and the lessee cannot insist that the amount of damages is more in amount than the value of the lease.²³¹ Where the lease was to the effect that a well should be put down to a certain depth by a certain time, but no rent was reserved, no term of demise was stated, though a right of entry for condition broken was reserved; and the lessee failed to put down the well, it was held that the lessor's damages were only nominal.²³² But where the royalty reserved was one-eighth of the oil produced, and the lease contained a covenant, "to continue, with due diligence and without delay, to prosecute the business to success or abandonment, and if successful, to prosecute the same without interruption for the common benefit of the parties;" it was held that this re-

^{229b} Allen v. Guaranty Oil Co. (Calif.), 168 Pac. 884.

Where oil wells are seized by the bankrupt court the lessee, on showing that he made a reasonable effort to secure possession from the court, or to operate under its direction, cannot be held liable in damages to the lessor during the period for a failure to operate under the lease. Munsey v. Marnet Oil & Gas Co. (Tex. Civ. App.), 199 S. W. 686.

(a) § 770.

²³⁰ Harris v. Ohio Coal Co., 57 Ohio St. 118; 48 N. E. Rep. 502; Blair v. Peck, 1 Penny (Pa.) 247; James v. Emery Oil Co., 1 Penny

(Pa.) 242; Harness v. Eastern Oil Co., 49 W. Va. 232; 38 S. E. Rep. 662; Sharp v. Behr, 117 Fed. Rep. 864; Kellyville Coal Co. v. O'Connell, 134 Ill. App. 311.

²³¹ Gale v. Kellerman, 123 Pa. St. 491; 16 Atl. Rep. 474; Crown Oil Co. v. Probert, 28 Ohio Cir. Ct. Rep. 739.

Such an agreement is valid, because the damage was necessarily indefinite, uncertain and speculative. Blodget v. Columbia Live Stock Co., 164 Fed. Rep. 305; Davidson v. Hughes, 76 Kan. 247; 91 Pac. Rep. 913, 915.

²³² Chamberlin v. Parker, 45 N. Y. 569; Duff v. Bailey (Ky.), 96 S.

quired the lessee to prosecute the business to an extent, considering the knowledge, skill and appliances available at the time, it could reasonably be done and leave the lessee a profit. In determining the measure of the damages for a failure to work the leased premises, the court laid down the following rule: From the amount of oil the lessor ought to have received, take the amount he actually received, and take the value of this difference at the time it should have been delivered to him. From this amount deduct the cost of producing what ought to have been produced at the time under the circumstances with the appliances then known, and add to this remainder interest on it from the time when the oil should have been produced to the time of trial.²³³ If there be a covenant to develop, yet the injured lessor can recover for its breach, even though the damages for its breach cannot be definitely ascertained.^{233a} The lessor is not required to wait until the expiration of the lease for an indefinite term to bring his action.^{233b} The fact that the oil has not been drawn off will not defeat the lessor's action.^{233c} All the lessors must join in the action to recover damages;^{233d} and if the royalties are payable to husband and wife jointly, she must join in the action.^{233e}

§ 113. Damages for neglect to develop or operate leased premises.(a)

The lessor has a right of action against the lessee for failure to develop the leased premises, as he had contracted to do; and the measure of damages is what the lessor was to receive under the contract,—the royalty, as a rule,—where the lessee leaves it in such condition, in case of a test well, that it cannot be tested, and the failure to test it is not unavoidable, or the lessee left

W. Rep. 557; 29 Ky. L. Rep. 919 (holding that there can be no recovery of damages without showing that there was oil and gas in the territory to be developed). See Dailey v. Heller, 41 Ind. App. 379; 81 N. E. Rep. 219.

²³³ Bradford Oil Co. v. Blair, 113 Pa. St. 83; 4 Atl. Rep. 218.

^{233a} Daughetee v. Ohio Oil Co., 263 Ill. 518; 105 N. E. 308; affirming 181 Ill. App. 135.

Yet it has been held that in an action to cancel the lease damages cannot be recovered if they are uncertain. Indiana Oil, etc., Co. v. McCrory, 42 Okl. 135; 140 Pac. 610.

^{233b} Daughetee v. Ohio Oil Co., *supra*.

^{233c} Daughetee v. Ohio Oil Co., *supra*.

A stipulation for a fixed minimum rental in a lease for gas and oil is not invalid by reason of the right which the lessor has for damages for breach of development covenants or for annulment of the lease for failure to reasonably develop the property. Gilbert v. Bolds (Ind. App.), 113 N. E. 379.

^{233d} Steele v. American Oil, etc., Co. (W. Va.), 92 S. E. 410.

^{233e} Coffman v. Hope Natural Gas Co., 74 W. Va. 57; 81 S. E. 575.

(a) § 869.

it in a condition that it can be tested and the lessor does not know it.²³⁵ Where a party purchased oil lands, agreeing to bore for oil and within a year complete a well, and if oil were found in paying quantities, to drill other wells, and deliver as royalty to the vendor a certain amount realized from the sale of oil and gas produced from all the wells, it was held that the remedy of the vendor for a failure on the part of the purchaser to keep the agreement, was an action for damages and not by way of forfeiture.²³⁶ In a case in the Federal Court, the following language was used: "But it is contended by the appellee that the clause providing a forfeit of fifty dollars for failure to bore the well within ninety days provides full compensation for failure to perform the condition. As a matter of fact, the fifty dollars was not paid or legally tendered; but, inasmuch as the grantor had declared a purpose not to receive the forfeit money, it will be treated as if it had been tendered. The question whether a sum of money stipulated to be paid is a penalty or liquidated damages is sometimes difficult of determination, there being no criterion of universal application. It depends upon a construction of the whole instrument, the intention of the parties, the nature of the act to be performed, and the consequences which would naturally flow from its non-performance. In many of the cases where oil leases have come before the courts, the doing of a certain thing, or the payment of rental in lieu thereof, is stipulated in the contract in a way that justifies the conclusion that the parties have provided exact and just compensation by way of liquidated damages for failure of performance in contracts, where parties stipulated in the alternative, and are free to those. But where consequences likely to follow non-performance are not measurably by any exact pecuniary standard, and the probable damage is out of all proportion to the amount agreed to be paid, this sum should be considered a penalty; and such we hold it to be in this case, where the sum of fifty dollars is stated to be a forfeiture. It

²³⁵ *McClay v. Western Pennsylvania Gas Co.*, 261 Pa. St. 197; 50 Atl. Rep. 978. See *Sharp v. Behr*, 117 Fed. Rep. 864; *Core v. N. Y.*,

etc., Co., 52 W. Va. 276; 43 S. E. Rep. 128.

²³⁶ *Ammons v. South Penn. Oil Co.*, 47 W. Va. 610; 35 S. E. Rep. 1004.

is in the nature of a security for the performance, and cannot be held to be liquidated damages from non-performance."²³⁷

**§ 114. Damages for neglect to operate and develop land.—
Res judicata.**

If a lessor bring suit to recover arrears of a portion of the oil due him as royalty, a judgment of recovery will bar his claim in a subsequent suit for damages for the lessee's failure to operate the premises.²³⁸

§ 115. Damages for taking oil or gas.

If the lessee's premises be invaded, and oil or gas extracted from them by sinking wells or in any other manner, he may recover damages from the wrongdoer.²³⁹ If the trespasser acted in good faith, the measure of damages when the suit is by the owner of the land and there is no lease involved, is the value of the oil (or gas) as it lay in the earth, when the value of the land has not been lessened by his operations or has been

²³⁷ *Huggins v. Daley*, 99 Fed. Rep. 606; 40 C. C. A. 12; 48 L. R. A. 320. The court cited *French v. Macale*, 2 Dru. and W. 274; *Dooley v. Watson*, 1 Gray 414; *Foster v. Elk Fork Oil and Gas Co.*, 90 Fed. Rep. 178; 61 U. S. App. 576; 32 C. C. A. 560; and *Steelsmith v. Gartlan*, 45 W. Va. 27; 29 S. E. Rep. 978; 44 L. R. A. 107.

In construing an oil and gas lease to determine whether a stipulation to pay a stated amount on the breach of a contract is a stipulation for a penalty or to pay stipulated damages, the court may consider what is universally known respecting the business to which the contract relates. *Crown Oil Co. v. Probert*, 28 Ohio Cir. Ct. R. 739.

A stipulation for a fixed minimum rental in a lease is not invalidated by reason of the right which the lessor has for damages for breach of covenant or for an annulment of the lease for failure to reasonably develop the property. *Gilbert v. Bolds (Ind.)*, 113 N. E. 378.

Where a lease provided that the lessee was to sink three wells to a certain depth, unless oil should be found in paying quantities at a less depth, and that he could abandon any part of the land to the

lessor who then might release the land so abandoned to others, it was held that the act of the lessee in representing to the lessor that no oil had been found and in executing a release was not a breach of the lease, in the absence of a showing that the lessor had been deprived of any part of his land or any oil or other minerals issuing therefrom or by the false statement the lessor had been deprived of an opportunity to sell his land advantageously. *Arnold v. Producers Oil Co. (Tex. Civ. App.)*, 196 S. W. 35.

²³⁸ *Hill v. Joy*, 149 Pa. St. 243; 24 Atl. Rep. 293; *Shertzer v. Myers*, 82 Kan. 275; 108 Pac. Rep. 275.

²³⁹ *Duffield v. Rosensweig*, 144 Pa. St. 520; 23 Atl. Rep. 4; *Backer v. Penn. Lubricating Co.*, 162 Fed. Rep. 627; 89 C. C. A. 419; *Bryson v. Crown Oil Co. (Ind.)*, 112 N. E. 1; Sec. 882, note 7; *Millan v. Bartlett (W. Va.)*, 89 S. E. 711.

In estimating damages to the assignee of a part of an interest in an oil and gas lease because of the lapse of the lease suffered by the assignor, it is proper to take into account the selling value of the lease when the right of action accrued. *Millan v. Bartlett (W. Va.)*, 89 S. E. 711.

increased by valuable erections placed upon it.²⁴⁰ If other wells be wrongfully sunk on the leased premises, the lessee may recover the difference between the value of the premises to him without the wells and their value to him with such wells.²⁴¹ If oil be taken by a lessee who believes his lease is valid, and his entry thereunder was peaceable and made in good faith, an answer to that effect where a prior lessee sues the second lessee is not demurrable, since such good faith may at least affect the extent of the second lessee's liability for damages.^{241a}

§ 116. Damages, measure of.—Proof.

Elsewhere has been stated the rule for the measure of damages because of a failure to develop the leased premises.^{241*} Some additional and more recent decisions may here be stated. As a preliminary remark we may state that the lessee or his assignee is liable for the resulting damages, if he unreasonably fails or refuses to use reasonable diligence in prosecuting operation.^{241b} A covenant imposing a penalty for failure to complete wells within a designated time has been held to conditionally impose one penalty for the non-drilling of each well, and not successive penalties for every three months of failure.^{241c} The burden is

²⁴⁰ *Dyke v. National Transit Co.*, 22 N. Y. App. Div. 360; 49 N. Y. Supp. 180; *Turner v. Seep*, 167 Fed. Rep. 646.

²⁴¹ *Dunfield v. Rosenzweig*, 144 Pa. St. 520; 23 Atl. Rep. 4.

Plaintiff sold defendant the oil and mineral rights in twenty acres of land for \$6,000, under an agreement reciting that, as plaintiff had agreed in a prior lease of other lands that no oil wells should be sunk on the plaintiff's land within a certain distance of the wells of said lessee, a survey should be taken of the land sold to defendant, and a deduction of \$300 per acre should be made for all lands within the prohibited distance, unless within six months plaintiff had secured the written waiver of his former lessee to the said provision of the lease. Plaintiff did not procure the waiver, and defendant paid the purchase price, less a deduction for about three acres found by the survey to

be within the prohibited distance, and received a deed conveying twenty acres. It was held that plaintiff, on procuring a waiver three months afterwards, could not maintain an action against the defendant to recover the three acres. *Bracker v. Sobra Vista Oil Co.*, 77 P. 649; 143 Cal. 678. In ascertaining the damages, no deduction can be made for the cost of dry holes drilled. *Bracker v. Penn. Lubricating Co.*, 162 Fed. 627; 89 C. C. A. 419; *Doddridge Co. Oil & Gas Co. v. Smith*, 173 Fed. 386; *Doddridge Co. Oil & Gas Co. v. Smith*, 154 Fed. 970.

^{241a} *Bracker v. Penn. Lubricating Oil Co.*, 162 Fed. Rep. 627; 89 C. C. A. 419. § 881, note 8.

^{241*} Sec. 112. See also Sec. 113.

^{241b} *Grass v. Big Creek, etc., Co.*, 75 W. Va. 719, 84 S. E. 750.

^{241c} *Petty v. United Fuel Gas Co.*, 76 W. Va. 268; 85 S. E. 523.

upon the lessor to prove that under all the circumstances the lessee had not exercised ordinary diligence.^{241d} If there be no definite basis available for estimating the damages sustained for a failure to develop the premises, then the best evidence permitted by the circumstances is sufficient.^{241e} The measure of damages for a breach of a lease providing that the lessee should pay \$50.00 a year for each gas well during the time gas should be marketed from the premises is \$50 for each well from the time it ought to have been drilled to properly develop the premises.^{241f} The lessor has a burden to show there was gas in the leased premises, if he seeks to recover more than nominal damages.^{241g}

§ 117. Damages reasonable where due diligence has been used.

Where damages is sought by the lessor because of a failure to operate, the question whether the lessee or operator has used due diligence and exercised sound judgment is involved; for the law does not require a lessee to operate a lease at a loss.^{241h} The burden is on the lessor to show that under all the circumstances the lessee failed to exercise ordinary diligence and, incidentally, sound judgment.²⁴¹ⁱ If he used reasonable diligence and sound judgment in ceasing to operate, he is not liable in damages for a failure to operate even though, after the lease was annuled, it be shown oil or gas in paying quantities could have been obtained so as to make the operation of the lease profitable.^{241j} Notwithstanding his good faith, if in fact he did not act as a reasonably prudent man in determining the extent to which he should develop the premises, he will be liable, if, by proper development oil could have been produced in paying quantities.^{241l} Owing to the fact that it is impossible to prove the actual damages, the opinions of experts are admissible to enable the court or jury to estimate the damages occasioned by the lessee's failure to develop

^{241d} *Grass v. Big Creek, etc., Co.*, 75 W. Va. 719; 84 S. E. 750.

^{241e} *Ibid.* How damages may be shown *C. Steele v. American Oil, etc., Co. (W. Va.)*, 92 S. E. 427.

^{241f} *Howerton v. Kansas Natural Gas Co.*, 82 Kans. 367; 108 Pac. 813; reversing 81 Kans. 553; 106 Pac. 47, on rehearing 34 L. R. A. (N. S.) 34.

^{241g} *Duff v. Bailey (Ky.)*, 96 S. W. 557; 29 Ky. L. Rep. 919.

^{241h} *Grass v. Big Creek, etc., Co.*, 75 W. Va. 719; 84 S. E. 750.

²⁴¹ⁱ *Ibid.*

^{241j} *Steele v. American Oil, etc., Co. (W. Va.)*, 92 S. E. 410; *Grass v. Big Creek, etc., Co., supra.*

^{241l} *Daughetee v. Ohio Oil Co.*, 263 Ill. 518; 105 N. E. 308; affirming 181 Ill. App. 135; *Cohn v. Clark (Okl.)*, 150 Pac. 467.

the premises.^{241k} In estimating damages to an assignee of a part of an interest in the lease suffered by the assignor, it is proper to take into account the selling value of the lease when the right of action accrued.^{241m}

§ 118. Damages occasioned by removal of casing.

A gas lease may provide that the lessee shall not remove the casing from the well when he surrenders the lease. If the lessee remove the casing in violation of such an agreement, then the measure of the lessor's damages, if it is necessary for the well's further and proper development, is an amount which will compensate the lessor for all injury caused by the removal, or which might result.²⁴¹ⁿ If there be no oil in the land, and the well has been sunk in barren and desert lands the measure of the damages is the value of the casing when removed.^{241o}

§ 119. Boundaries.—Location of wells.

As a general rule, the lessee has the right to take all the oil and gas under the leased premises. But usually he is not entitled to the possession of the entire surface of the leased tract; for the lease provides, generally, that his possession shall be limited to a certain portion of the leased tract, though he is entitled to all the oil or gas under the surface of the entire tract, if he can draw it out by means of wells sunk in those portions of the tract designated for his use. A lease of eighty acres, "reserving sixty acres around the buildings on said premises," the boundaries to be designated by the lessor, is not so indefinite as to defeat an action for the rent due under it, the lessor being ready at all times to locate the boundaries.²⁴² The lessor having failed to locate the boundaries, it was held

^{241k} *Wheeland v. Fredonia Groc. Co.*, 92 Kans. 50; 138 Pac. 1010.

^{241m} *Millan v. Bartlett* (W. Va.), 89 S. E. 711.

²⁴¹ⁿ *Johnson v. Hinkel* (Cal. App.), 154 Pac. 487.

^{241o} *Johnson v. Hinkel*, *supra*.

Under the Civil Code of California, Sec. 3300, a lessor of oil lands who gave the lessee an option to buy for \$20,000, if oil was found, cannot recover for breach of the les-

see's agreement not to remove well casing on abandonment \$22,500 damages irrespective of the presence of oil, whether the well was of value without casing, would have been of value if restored or could have been made useful at less cost. *Jackson v. Hinkel*, *supra*.

²⁴² *Indianapolis, etc., Co. v. Spough*, 17 Ind. App. 683; 46 N. E. Rep. 691.

that he had waived his right to declare a forfeiture of the lease on the ground that the lessee had not begun operations within the time designated. Adjoining land owners may agree that they will not drill wells within a certain distance of the boundary lines of their respective tracts; and the promise of the one will be sufficient consideration for the promise of the other, for the reason that the agreement is for the protection of their respective lands. This agreement will be protected by an injunction.²⁴³ A law prohibiting land owners taking solid minerals within a named distance from their boundary lines is valid, being only a restriction on the land owners for their common benefit.²⁴⁴ In a suit to settle and adjust boundary lines of a lease and tract of land, all persons having an interest in the controversy should be made parties to the action.²⁴⁵ If an oil lease give the lessor the right to select one acre on which a test well is to be drilled, and he select it, and the lessee drill upon it, such lessor can not make a second selection and insist that the lessee put down another well.²⁴⁶ A gas and oil lease requiring the lessee to sink seven wells and giving the lessee the right to retain ten acres of the tract for each well sunk, when two are completed, and giving such lessee the further right, upon the completion of two wells, to abandon the remainder of the tract, does not authorize the institution of a law suit by the lessor, to quiet his title to the remainder of the tract, until he makes a demand upon such lessee to make a

²⁴³ *Ware v. Langmade*, 9 Ohio C. C. Rep. 85; 6 Ohio Cir. Dec. 43; 2 Ohio Dec. 116.

Where a lessee covenanted to put down a gas or oil well every ninety days on a certain tract, or to surrender his rights under a grant of the gas and oil thereunder, and he failed to do either, and the lessor had been accepting the benefits of the grant as to the wells in operation, a demand for a decision, it was held, should have been made upon the lessee as to which course he would pursue, before a suit was brought to quiet title. And a complaint to quiet title to fifty acres out of a one-hundred-acre tract, leaving five

ten-acre tracts, upon each of which was an oil well, is insufficient where the original tract did not specify any method of ascertaining the boundaries of such ten-acre tracts. *Monaghan v. Mount*, 36 Ind. App. 188; 74 N. E. Rep. 579; *Jones v. Mount*, 30 Ind. App. 59; 63 N. E. 798.

²⁴⁴ *Maple v. John*, 42 W. Va. 30; 24 S. E. Rep. 608; 32 L. R. A. 800.

²⁴⁵ *Steelsmith v. Fisher Oil Co.*, 47 W. Va. 391; 35 S. E. Rep. 15; *Moore v. Jennings*, 47 W. Va. 181; 34 S. E. Rep. 793.

²⁴⁶ *Stahl v. Van Vleck*, 53 Ohio St. 136; 41 N. E. Rep. 35. See *Meeker v. Browning*, 9 Ohio C. D. 108; 17 Ohio C. C. 548.

definite reservation for each of such completed wells. "In this case," said the court, "appellant [the lessor] arbitrarily set off twenty acres as a reservation for the two active wells, and sought to quiet his title against the lease as to the remainder of the land. This appellant cannot legally do. He made no demand upon the original lessee or its assigns that well reservations be selected, and without such demand and refusal to comply therewith, in the absence of an agreement describing the premises reserved with each well, the court because of an indefinite and insufficient description of the land, would have no basis upon which to render a decree quieting title.^{246a} And where the lease provided that no well should be sunk on twenty acres, to be designated by the landlord, situate about his buildings, and he afterwards pointed out a place where the first well might be sunk, but neither the lessee nor its assignees ever demanded that he should designate the lands reserved more definitely, it was held that such lessee and his assignees were not discharged from their obligations under the lease.^{246b} The term "cultivated enclosure," used in an oil lease in which the lessee could bore wells, was held to include those drilled after as well as those which were in existence at the date of the lease. An enclosure which contained a cultivated tract and an uncultivated tract was held to be a cultivated enclosure, and the lessee might not prospect or bore holes on the former, but he might do so on the latter if his operations did not unnecessarily interfere with the use of the cultivated tract for agricultural purposes. Between the cultivator of the land and the lessee, he who first by an open and notorious act in good faith commenced and with diligence proceeded to subject an uncul-

^{246a} *Pittinger v. Ramage*, 40 Ind. App. 486; 82 N. E. Rep. 478; *Jones v. Mount*, 166 Ind. 570; 77 N. E. Rep. 1089; *Jones v. Mount*, 30 Ind. App. 59; 77 N. E. Rep. 1089; *Monaghan v. Mount*, 36 Ind. App. 188; 74 N. E. Rep. 579.

^{246b} *Indianapolis Gas Co. v. Pierce*, 36 Ind. App. 573; 76 N. E. Rep. 173; *Indianapolis Gas Co. v. Rayle*, 36 Ind. App. 707; 76 N. E. Rep. 176; *Kokomo, etc., Oil Co. v. Al-*

bright, 18 Ind. App. 151; 47 N. E. Rep. 682; *Ramage v. Wilson*, 37 Ind. App. 532; 77 N. E. Rep. 368.

Where the lease merely gave the lessee such land as was necessary to drill and operate wells, it held that the lessee could not show an understanding that for each well opened he should be entitled to one acre of ground. *Moore v. Decker* (Tex. Civ. App.), 176 S. W. 816.

tivated tract to his use, had the superior right. His subsequent act related back to the initiation of his proceedings.^{246c}

§ 120. Selection of site.

Not infrequently the lessor, or the lessor and lessee jointly, is to select the site for the well. If the lessor is to select it, and the lessee assents to the selection, the former will be bound.²⁴⁷ The same is true where the lessor is to select parts of a large tract leased upon which operations may be carried on, according to the provisions of the lease.²⁴⁸ If the lessor is to make the selection with the lessee of the tract out of a larger tract leased, but he has not done so, he may recover rent for the demised premises, if he allege and prove that he has always been ready to make it, and the neglect of the lessee to join with him in making the selection will not defeat the action.²⁴⁹ If a dispute arise as to the location of the well, whether on the lands or not, the jury must decide the question as one of fact.²⁵⁰

^{246c} Sec. 82, notes. Barnsdoll Oil Co. v. Leahy, 195 Fed. 731.

²⁴⁷ Stahl v. Van Vleck, 53 Ohio St. 136; 41 N. E. Rep. 35.

If the lessor is to locate the wells and fails to do so he cannot insist upon a forfeiture on the ground the lessee did not begin operation in time. Henderson v. Fennell, 183 Penn. 547; 38 Atl. 1018.

²⁴⁸ Stahl v. Van Vleck, *supra*; Indianapolis, etc., Gas Co. v. Spaugh, 17 Ind. App. 683; 46 N. E. Rep. 691; Diamond Plate Glass Co. v. Tennell, 22 Ind. App. 132; 52 N. E. Rep. 168.

²⁴⁹ Indianapolis, etc., Gas Co. v. Spaugh, *supra*. See Balfour v. Russell, 167 Pa. St. 287; 31 Atl. Rep. 570; Duffield v. Hue, 136 Pa. St. 602; 20 Atl. Rep. 526; Ramage v. Wilson, 37 Ind. App. 532; 77 N. E. Rep. 368; Pittinger v. Ramage, 40 Ind. App. 486; 82 N. E. Rep. 478.

²⁵⁰ Hamilton v. Pittock, 158 Pa. St. 457; 27 Atl. Rep. 1079.

If a lessee so locate a well so as to unnecessarily interfere with the lessor's rights, he is not entitled to enjoin the lessor from interfering with the drilling of the well at the place where it is located. Gillespie v. American Zinc, etc., Co., 247 Penn. 222; 93 Atl. 272.

A lessee agreed, in consideration that the lessor relinquish all money stipulated for, for the location of additional wells, he would drill additional wells within a time stated. This was held to be an executed release of the location moneys under the former contract, and not merely a conditional one, which remained executory until the new wells were drilled within the time limited. Meeker v. Browning, 9 Ohio C. D. 108; 17 Ohio C. C. Dec. 548.

Where an oil lease provided that

§ 121. Number of wells.

If the number of wells to be drilled are specified in the lease, there is no room for judicial interpretation of the duty of the lessee in that respect. If the number of producing wells are named, then that number must be drilled, unless it be clearly shown that the number fixed cannot be obtained on the premises, by showing that some of those drilled were dry wells, and that to drill others would not be a benefit to the lessor. If the number of wells is not specified, then a number sufficient to develop the premises must be drilled;²⁵¹ but the court will not undertake to direct how the lessee shall work the premises, or

oil wells must be located at a point satisfactory to both parties, but the only violation of the lease or dissatisfaction averred in a bill to restrain the drilling of a well, referred to the wrongful drilling of a well on a part of the tract reserved to the grantor, an indefinite, unexplained and arbitrary dissatisfaction, not specifically averred in the bill, it was held could not be relied upon to show error in refusing an injunction. *Owens v. American, etc., Gas Co.*, 232 Penn. 522; 81 Atl. 554.

A lessee cannot choose locations for drilling wells in utter disregard of the landowner's rights. *Gillespie v. American, etc., Co.*, 247 Penn. 222; 93 Atl. 272. He cannot select the place where the operation of the well will endanger the lives and property of persons lawfully using the surface where he can drill at another safe place equally advantageous to himself. *Gulf Pipe Line Co. v. Pawnee-Tulsa, etc., Co.*, 34 Okl. 775; 127 Pac. 252; 41 L. R. A. (N. S.) 1108.

²⁵¹ *Kleppner v. Lemon*, 176 Pa. St. 502; 38 W. N. C. 388; 35 Atl. Rep. 109; 27 Pittsb. Leg. J. (N. S.) 21; *Aye v. Philadelphia Co.*, 193 Pa. St. 451; 44 Atl. Rep. 555; *Kleppner v. Lemon*, 29 Pittsb. L. J. (N. S.) 346; *Gadbury v. Ohio, etc., Co.*, 162 Ind. 9; 67 N. E. Rep. 259; 62 L. R. A. 895; *Monaghan v. Mount*, 36 Ind. App. 188; 74 N. E. Rep. 579; *Brown v. Producers Oil Co.*, 134 La. 701; 64 So. 684; *Highfield v. Kirk*, 248 Penn. 19; 93 Atl. 815.

For an instance where a lease of 19 quarter sections were held a separate lease of each quarter, re-

quiring the sinking of a well in each quarter, to prevent a forfeiture. See *Producers Oil Co. v. Snyder (Tex.)*, 190 S. W. 514.

Where the lessee agrees to drill a number of oil and gas wells on the leased lands, the drilling of a few is not a fulfillment of his obligation. *Caddo Oil, etc., Co. v. Producers Oil Co.*, 134 La. 701; 64 So. 684.

Where it is the agreement that if the first well proves productive eight more shall be drilled, the lessee must comply with the agreement or suffer a forfeiture of his lease. *Paraffine Oil Co. v. Cruce (Okl.)*, 162 Pac. 716.

A contract to put down a test well and afterwards others "if oil or gas is found in paying quantities" means that the total expense and all of the circumstances and prospects shall be considered in arriving at a decision as to whether wells will produce "in paying quantities;" and leaves the decision to the operator, acting honestly and in good faith, whether the well produces "in paying quantities," but his judgment must not be arbitrary nor spring from some ulterior purpose to get a dishonest advantage. His judgment cannot be attacked except on the ground of fraud, and this must be pleaded. *Manhattan Oil Co. v. Carrell*, 164 Ind. 526; 73 N. E. Rep. 1084.

A gas and oil lease was executed Dec. 20, 1902. By its terms the lessee was required to complete three wells within one year from the date of the lease, provided each was a paying gas well; and also to complete a well every sixty days

how many wells shall be sunk; and the lessor cannot claim a forfeiture simply because the lessee is not sufficiently active in developing the property.²⁵² If the lessee has agreed to sink a certain number of wells, he cannot, after sinking a part of the number, successfully claim that it would be useless to sink the remainder, on the ground that the sinking of them would probably reduce the flow of the oil or gas in the wells already sunk, and his profits thereby be reduced and the wells probably rendered valueless.²⁵³ A lease of fifty-three acres in 1892 provided that as many wells should be drilled "as may be reasonably necessary to secure the oil for the common advantage of both the lessor and lessee." Between 1892 and 1896 the lessee drilled four wells on the west side of the leased premises, which were paying wells, and one on the east, which did not pay. The distance from the eastern well to the western well was from one thousand to twelve hundred feet. Eight hundred feet on the north and east of the leased premises wells had been drilled which were producing in paying quantities. There was proof that a well would draw oil from the sand a distance of five hundred feet. An action was brought to have the lease declared forfeited, on the ground that the lessee refused to drill another well on the eastern side of the premises. The court required the lessee to file with it a stipulation to commence a well on the eastern portion of the premises within twenty days, or have the lease declared forfeited.²⁵⁴ But the case on appeal was reversed, on the ground that the lessee cannot be compelled, under

until the ten wells were drilled, provided each well drilled was a paying well. The lessee put down a gas well by June, 1903, and after using it a short while he plugged it, did not use it thereafter and put down any additional wells. It was held that he had abandoned the lease. *Beatty-Nickle Oil Co. v. Smethers*, 49 Ind. App. 602; 96 N. E. 19.

²⁵² *Baldwin v. Ohio Oil Co.*, 13 Ohio Cir. Ct. Rep. 519; 7 Ohio Dec. 50; *Ohio Oil Co. v. Kelley*, 9 Ohio C. C. Rep. 511; 6 Ohio Cir. Dec. 470; 40 Wkly. L. Bull. 338; 3 Ohio Dec. 186; *J. M. Guffey Petroleum Co. v. Jeff Chaison Townsite Co.*, 48 Tex. Civ. App. 555; 107 S. W. Rep. 609. See *Pennsylvania case*.

²⁵³ *Young v. Equitable Gas Co.*, 5 Pa. Super Ct. Rep. 232; 23 Pittsb. L. J. (N. S.) 75; 41 W. N. C. 24; *Abrns v. Chartiers Valley Gas Co.*, 188 Pa. St. 249; 41 Atl. Rep. 739; *Crown Oil Co. v. Probert*, 28 Ohio Cir. Ct. Rep. 739.

Plaintiffs made a contract with defendant granting it all the gas and oil in a tract of land of seventy acres with the right to drill for it, the plaintiff to receive one-sixth of all the oil and gas obtained. It also provided that "defendant commence to drill the first well in twenty days, that each well be due in sixty days from the completion of the last one, or a monthly rental of \$5 for each well due, that each location consist of ten acres more or less and no well occupy more than one acre." The defendant completed seven of the wells on the land according to the terms of the contract, and later completed three more, but more than sixty days elapsed between the completion of each of these last three. It was held that seven wells were all that were required under the contract. *Stahl v. Illinois Oil Co.*, 45 Ind. App. 211; 90 N. E. Rep. 632.

²⁵⁴ *Young v. Vandergrift*, 30 Pittsb. Leg. J. (N. S.) 39; *Colgan*

an implied covenant to develop the premises, to put down a well on the other half, without clearly showing that he is not acting in good faith on his business judgment, but is acting fraudulently, with the intent to obtain a dishonest advantage.²⁵⁵ Where the agreement was for two test wells, and the first one drilled demonstrated that the premises were unproductive, it was held that the lessee was not bound to drill the second well or pay the cash rental provided for in the lease; for as the lands were unproductive, there was nothing in the contract to compel him to drill a second well or pay the rent.²⁵⁶ If the lessee does not drill the requisite number of wells, so as to fully develop the land, where the number of wells is not designated in the lease, the lessor has his action against him for damages.²⁵⁷ But if the lease provides the number of wells that shall be drilled, there is no implication that more than the number specified shall be drilled where it should turn out that not enough was provided for to develop the entire premises.²⁵⁹ In a Pennsylvania case the following language was used with reference to the number of wells that must be drilled: "It is an implied condition of every lease of land for the production of oil therefrom that when the existence of oil in paying quantities is made apparent the lessee shall put down as many wells as may be reasonably necessary to secure the oil for the common advantage of both lessor and lessee. In determining when and where such wells shall be located, regard must be had to the operation on adjoining lands; and to the well known fact that a well will drain a territory of much larger extent when the sand-rock in which the oil or gas is found is of coarse and loose texture than when it is of fine grain and compact character. Whatever ordinary knowledge and care

v. Forest Oil Co., 30 Pittsb. Leg. J. (N. S.) 68 (almost identical with preceding case); Kleppner v. Lemon, *supra*; Ohio Oil v. Harris, 1 Ohio N. P. 132; 1 Ohio Dec. 157.

²⁵⁵ Colgan v. Forest Oil Co., 194 Pa. St. 243; 75 Am. St. Rep. 695; 30 Pittsb. Leg. J. 221; 45 Atl. Rep. 119; reversing 30 Pittsb. Leg. (N. S.) 213.

²⁵⁶ Kenton Gas, etc., Co. v. Orwick, 21 Ohio Cir. Ct. Rep. 274; 11 Ohio C. D. 786. See Sec. 112.

²⁵⁷ Harness v. Eastern Oil Co., 49 W. Va. 232; 38 S. E. Rep. 662; J. M. Guffey Petroleum Co. v. Jeff Chaison Townsite Co., 48 Tex. Civ. App. 555; 107 S. W. Rep. 609; Ramage v. Wilson, 37 Ind. App. 532; 77 N. E. Rep. 368; Dailey v. Heller, 41 Ind. App. 379; 81 N. E. Rep. 219. To a complaint for the enforcement of the provisions of a lease, an answer that defendant

complied with such lease as to the drilling of two wells; that he cancelled said contract as to the third well by releasing six and two-thirds acres of the twenty-acre tract; that the lease provided that lessee should have the right to "cancel and annul its contract or any part thereof at any time;" that it was understood by the parties that such lease would be cancelled and annulled as to such part of the tract for such well not drilled, is bad, there being nothing in the lease to indicate a lease of a part only of the tract nor anything in the answer to show that the wells were put down with such end in view, or how a division could be made. Ramage v. Wilson, 37 Ind. App. 532; 77 N. E. Rep. 368.

²⁵⁹ Stoddard v. Emery, 128 Pa. St. 436; 18 Atl. Rep. 339; 24 W. N. C. 566; Harris v. Ohio Coal Co., 57 Ohio St. 118; 48 N. E. Rep. 502.

would dictate as the proper thing to be done for the interests of both lessor and lessee under any given circumstances is that which the law requires to be done as an implied stipulation of the contract."²⁶⁰ The number and location of the wells depend upon the character of the leased territory, and "whether, after discovery of oil or gas by means of the initial or experimental

²⁶⁰ *Kleppner v. Lemon, supra.*

A contract providing that the lessee shall drill "at the rate of one well every sixty days after date until five wells are completed," means one well should be drilled within sixty days, a second, within 120 days, etc., from the date of the lease. Where the first well is drilled within the time fixed in the contract, a provision therein, that in case no well is completed within sixty days from the date the grant shall become null and void unless a penalty of \$1 per day is paid for each day completion is delayed, does not apply in determining liability for delay in sinking subsequent wells. In such an instance the contract calling for the sinking of five wells, the \$1 payment attaches to each of these alleged delayed wells for the days each of the wells are delayed. *Dailey v. Heller*, 41 Ind. App. 379; 81 N. E. Rep. 219.

Neglect to use diligence and good faith in the development of the leased premises gives a cause of action to the lessor. *Kleppner v. Lemon*, 29 Pittsb. L. J. (N. S.) 346; affirmed 198 Pa. St. 430; 48 Atl. Rep. 483; *Gadbury v. Ohio, etc.*, Gas Co., 162 Ind. 9; 67 N. E. Rep. 259.

An oil and gas lease, in consideration of \$1, gave to the lessee the exclusive right to operate for oil and gas on certain land. It also provided for forfeiture if a well was not drilled within a year, without the payment of rent as an alternative, the lessors to have gas for domestic use, if found in quantities sufficient to justify the expense of marketing and \$50 a year during the time gas was marketed from each producing well. It was held that the lease contemplated that a well put down within a year, and from which gas in sufficient quantity for marketing was obtained, should be operated and gas marketed therefrom within a reason-

able time, and that other wells should be drilled and operated with reasonable diligence to utilize the rights granted. *Howerton v. Kansas Natural Gas Co.*, 81 Kan. 553; 106 P. 47; 34 L. R. A. (N. S.) 34, reversed 82 Kan. 367; 108 Pac. 813.

Where an oil and gas company takes a lease of land for a term of years "for the sole and only purpose of drilling and operating for petroleum oil or gas," and covenants to pay a royalty on oil and gas produced, and also, as additional rental, to furnish the lessor with natural gas for heat and light for his house during the term of the lease, and the lease contains no forfeiture clause, or clause as to the number or depths of the wells to be drilled, or as to the time when operations are to begin, or as to finding oil or gas in paying quantities, the lessee cannot discharge itself from the obligation of the covenant to furnish natural gas for domestic purposes by ceasing its operations when the production of gas ceased from the single well which had been drilled. *Boal v. Citizens' Natural Gas Co.*, 23 Pa. Super Ct. 339.

A covenant in an oil lease to drill one well every two months after oil is produced until the land is well developed is complied with where the required number of wells have been drilled, although not at regular intervals of two months, and a court of equity will not decree a forfeiture because of such fact, especially where the lessor made no objection on that ground when they were being drilled. *Kellar v. Craig*, 126 F. 630; *Doddridge County Oil & Gas Co. v. Smith*, 154 Fed. Rep. 970.

The drilling of a well by a prospective lessee while the lease is under consideration by the prospective lessor, is not a compliance with the lease to drill a well within thirty days from the date of the lease.

well, there is a duty to sink additional wells depends upon the probability arising from the circumstances surrounding the property that an additional well or wells would be profitable to the lessee. He is under no duty to operate at a loss to himself to make the premises profitable to the lessor.^{260a} If the number of wells to be drilled is not specified, there is no implied obligation on the

Cooke v. Gulf Refining Co., 127 La. 592; 53 So. 874.

Several owners of separate tracts gave a joint lease upon all of them for a gross price without stating the amount to be paid each of them. It was stipulated that drilling should be commenced by the lessee within one year. It was held that this did not require operation to be begun on each tract within the year. *Nabors v. Producers Oil Co.*, 140 La. 985; 74 So. 527; L. R. A. 1917 D 1115.

On November 6, 1913, lessors leased a tract of land for oil and gas mining purposes to the P. company which thereafter assigned certain interests therein to other oil companies. Section 3 fixed the term of the lease for one year, "and so long thereafter as oil or gas is produced from said land" by the lessee, "its successors or assigns, in accordance with the stipulations of sections 6 and 7 of this contract." After section 5 obligated the lessee to begin operations for drilling in 30 days and to diligently prosecute the same until a test well was completed, section 6 provided; "That if said territory proves productive, then the lessee to complete this contract shall drill as many as eight wells on said premises." The test well proved the territory productive January 20, 1914, and it took about 20 days to drill a well. Held, that "if" meant "when" and that "then" is an adverb of time and means "at the time," and that, at the time the territory proved productive by the drilling of the test well, it was then the duty of the lessee to drill as many as eight wells upon the premises and within a year from the date of the lease as a condition precedent to the extension of the lease beyond the term of one year fixed in the lease. And, whether said wells

were by the lessee drilled with due diligence and dispatch, having in view the interests of both parties to the lease, and so as to produce all the oil and gas that may be reasonably produced from the premises, as required by the lease, if available as a defense, was a question of fact; and, being found adversely to defendant, will not be disturbed, there being evidence reasonably tending to support the finding. And there being no question that oil was found in paying quantities in the first well drilled, and there being evidence reasonably tending to support the finding of the court, in effect, that there was at its completion a profitable market for the product of the first well, the lessee cannot escape a forfeiture of the lease, declared by the trial court, in virtue of section 11 of the lease, for failure to drill as many as eight wells upon the premises within one year from the date of the lease, under the plea that there was not a profitable market at its completion for the product of the first well. *Paraffine Oil Co. v. Cruce (Okla.)*, 162 Pac. Rep. 716.

A complaint in an action for minimum rental under gas and oil lease alleging lease to mean that after defendants had drilled sufficient number of wells as determined by them the minimum rental of \$25 per month was to be paid, it was held sufficient on demurrer even though the rule that a sufficiency of development work is to be determined by the lessee does not apply to a lease specifying the number of wells to be drilled. *Gilbert et al. v. Bolds et al.*, No. 9062 (Ind.), 113 N. E. 378; 113 N. E. Rep. 378.

^{260a} *Hall v. Oil Co.*, 71 W. Va. 82; 76 S. E. 124; *Jennings v. Southern Carbon Co.* (W. Va.), 94 S. E. 363.

lessee to develop the land fully by sinking sufficient wells to secure to the lessor a reasonable royalty. But where a lease only required the lessee to drill one good or producing well to preserve his rights as a lessee, which he did, and he continued to operate such well and paid the lessor his royalty, it was held that the lessor was under a duty to notify the lessee that she required further development before she could insist upon a forfeiture for the lessee's failure to develop the premises fully.^{260b} If the number of wells is not specified, then the lessee determines the number to be drilled in order to develop the premises fully at a profit, and his determination is usually accepted by the courts as *prima facie* conclusive, unless it be shown that he fraudulently failed to act when affirmative action on his part was required.^{260c}

§ 122. Number of wells.—Protecting lines.

Elsewhere has been discussed the number of wells the lessee is required to drill.²⁶¹ Of course, if the number is specified, that determines the rights of the parties in this connection.²⁶² But if the number is not specified, then the lessee must drill and operate enough as is ordinarily required for the production of the oil contained in such lands, and afford ordinary

^{260b} *Dinsmore v. Combs* (Ky.), 198 S. W. 58, citing *Soaper v. King*, 167 Ky. 121, 180 S. W. 46, and *Culbertson v. Iola Portland Cement Co.*, 87 Kan. 529; 125 Pac. 81; Ann. Cas. 1914 A. 610.

^{260c} *Grass v. Development Co.*, 75 W. Va. 719; 84 S. E. 750; L. R. A. 1915 E. 1057; *Steele v. Development Co.* (W. Va.), 92 S. E. 410; *Hope v. Southern Carbon Co.*, 73 W. Va. 215; 80 S. E. 368; 94 S. E. 363.

²⁶¹ § 121.

²⁶² *Colgan v. Forest Oil Co.*, 194 Pa. St. 234; 45 Atl. Rep. 119; 30 Pittsb. L. J. (N. S.) 213; 75 Am. St. Rep. 695. See *Stahl v. Van Vleck*, 53 Ohio St. 136; 41 N. E. Rep. 35; 33 Wkly. L. Bull. 335;

and *Parish Fork Oil Co. v. Bridge-water Gas Co.*, 51 W. Va. 583; 42 S. E. Rep. 655; 59 L. R. A. 566.

A requirement in an oil lease that six wells are to be put down on the property is not complied with by putting down five wells and subsequently deepening one of the five. *Powers v. Bridgeport Oil Co.*, 87 N. E. 381; 238 Ill. 397.

An oil and gas lease on three separate tracts gave the lessee two years within which to drill a well on the premises, and provided that the time might be *enlarged by the payment of an annual rental* from the expiration of the second year until the well was drilled, and that, if no well should be drilled on the premises within five years, the lease

protection to the lines.²⁰³ If a single well demonstrates the fact that there is no oil, in case of an oil lease, or no gas, in case of a gas lease, "the contract is at an end as soon as such first well is abandoned as unsuccessful."²⁰⁴ A contract be-

should be *void*. It was held that the *diligence* which the lessee was required to exercise in development during the first five years was expressly defined, and that a well having been drilled on one of the tracts during the fifth year, and the stipulated rental paid from the end of the second year until the well was drilled, the lease was not voidable because other wells were not drilled during the five-year period. *Brewster v. Lanyon Zinc Co.*, 140 F. 801; 72 C. C. A. 213. See § 210 and page 224, note 3.

²⁰³ *Harris v. Ohio Oil Co.*, 57 Ohio St. 118; 48 N. E. Rep. 502; *Kleppner v. Lemon*, 176 Pa. St. 502; 35 Atl. Rep. 109; *Ohio Oil Co. v. Kelly*, 9 Ohio C. Ct. Rep. 511; 6 Ohio Cir. Ct. Dec. 470; 40 Wkly. L. Bull. 338; 3 Ohio Dec. 186; *Kellar v. Craig*, 126 Fed. Rep. 630; *J. M. Guffey Petroleum Co. v. Jeff Chaison Townsite Co.*, 48 Tex. Civ. App. 555; 107 S. W. Rep. 609.

Ordinarily, though, there is no implied covenant by the lessee to protect the premises against drainage through flowing wells on adjacent land by drilling offset wells, which is affected within the time for which the lessor has accepted a consideration in lieu of development. *Stanley v. United Fuel Gas Co.* (W. Va.), 90 S. E. 344; *Carper v. United Fuel Gas Co.* (W. Va.), 89 S. E. 12. In the last case, see as to when lessor may enter and drill an offset well near the time of the expiration of the lease. But it has been held that the lessor may maintain trespass on a case because of

an injury sustained from the lessee's failure to drill wells necessary to save oil on his lands and prevent it from being drained away by wells located on adjacent land. *Steele v. American Oil, etc., Co.* (W. Va.), 92 S. E. 413.

If the lease does not fix the number of wells to be drilled as contemplated by the agreed development work, then the lessee has the right to determine the number to be drilled and his decision is conclusive as long as he acts honestly and in good faith upon sound business principles. *Gilbert v. Bolds* (Ind. App.), 113 N. E. 379. But where the object of the operations contemplated is to obtain a profit for both lessor and lessee neither, in the absence of a stipulation to that effect is the arbiter of a number of wells to be put down. *Paraffine Oil Co. v. Cruce* (Okla.), 162 Pac. 716.

²⁰⁴ *Venture Oil Co. v. Fretts*, 152 Pa. St. 451; 25 Atl. Rep. 732; *Steelsmith v. Gartlan*, 45 W. Va. 27; 29 S. E. Rep. 978; 44 L. R. A. 107; *McConnell v. Lawrence Natural Gas Co.*, 30 Pittsb. Leg. J. (N. S.) 346.

Where the lessee binds himself to commence drilling for oil or gas within one year or forfeit his contract, there is no implied obligation on him to drill as many wells as may be reasonably necessary to secure oil or gas for the advantage of the lessor within the year, where it is not found in paying quantities. *Nabors v. Producers Oil Co.*,

tween the owner of land and the lessee provided that the owner granted all right to the oil and gas thereunder, with the right to enter and drill for oil, the lessee to drill a well within ten days and, when the first well was completed, if it was a paying well, to commence a second well within ten days, and, on its completion, if paying, to commence a third well within a certain time. The lease further provided that the lessee might release all or any part of the tract after completing the first well, thereby relieving itself from all obligations as to the part released, and, on releasing any part of the tract, could continue operations on the part on which it may have drilled any wells, retaining such part of the tract as might be necessary for operating wells drilling or then drilled; the amount to be retained to be based on one-third of the whole tract leased for each well already drilled or drilling. It also provided that the discharge of the lessee's obligation to drill the first well should be a sufficient consideration to support the options contained therein. The lease was to continue in force for one year, and as long thereafter as oil was found in paying quantities, and the lessor was to receive one-sixth of the oil produced. It was held that while the lessee had the exclusive right to sink any number of additional wells on unreleased parts of the tract during the year, if the first well was non-paying, he was not bound to do so, and need not drill more than three in any event, either of which could be drilled on any unreleased part of the tract, without regard to the location of wells on adjoining tracts, so that where the lessor, to protect the oil under the tract from exhaustion by a well on adjoining tract, drilled a well on an unreleased part without the lessee's consent, the oil therefrom belonged to the lessee to be apportioned under the terms of the lease.^{264a}

140 La. 985; 74 So. 524; L. R. A. 1917 D 1115. In such an instance the lessor cannot cancel the lease on the ground that the lessee had not performed the implied obligation to drill other wells for the common advantage of the party. *Ibid.*

If the lessee does not put down sufficient wells to develop the land,

and he drains off the oil or gas by wells sunk on adjoining lands, he will be liable for the oil or gas thus drawn away. *Culbertson v. Iola, etc., Co.*, 87 Kans. 529; 125 Pac. 81.

^{264a}*O'Neil v. Sun Co.* (Tex. Civ. App.), 123 S. W. Rep. 172.

§ 123. Test Wells.—Excuse for not drilling.

The name "test well" is practically its own definition, or at least suggests its meaning. It is a well put down on the leased premises to determine whether or not oil or gas exists thereon, and usually whether it exists in paying quantities.²⁶⁵ Not infrequently a lease provides that a test well shall be drilled within a certain length of time after it is granted; and when such requirement is inserted it must be complied with, or the lessee will forfeit his right to operate on the premises. In leases for mining solid minerals it is permissible to show as a defense in an action to recover damages for not opening a mine, that there is no mineral beneath the surface, and the lessee may avail himself of that defense and show that such is the fact, he having the burden to show there is no mineral.²⁶⁶ But in the case of a gas or oil lease a defense that there is no gas or oil beneath the surface cannot be shown in any other way than by sinking a well, unless, of course, the plaintiff admits that such is the case, thereby waiving his right to insist upon the well as a test. It cannot be shown that the adjacent territory, or even the entire adjacent surrounding territory has been drilled for gas or oil, in the most thorough manner and none found. In a Pennsylvania case the following language was used:

"The averment in the affidavit of defense that it had been 'ascertained by methods practiced and approved by men skilled in the business, that neither carbon oil nor gas existed in the land leased,' and the view, based thereon, urged with so much force by the distinguished counsel, that it must now be accepted as a demonstration of science that putting down a well on land shown by exploration of neighboring territory to be dry, is a useless expense and damage, and that parties in contracting on the subject must be considered to have had this fact in mind, would be a strong argument to the jury, if the case was one for them, that the plaintiff had suffered no actual dam-

²⁶⁵ *Petroleum Co. v. Coal, etc.*,
Co., 89 Tenn. 381; 18 S. W. Rep. 65.

²⁶⁶ *Cook v. Andrews*, 36 Ohio St.
174.

In *Bell v. Truit*, 9 Bush. 257, it

was held that the lessee is not liable unless there was a reasonable probability that the lessor would be benefited by drilling the well.

ages by the defendant's default. But the conclusive answer in the present case is that the parties have clearly stipulated for the mode in which the trial shall be made, and it is to be by a well on this land. There is no room for science, any more than there is for a jury, to say that it will be of no use to do it; the parties have explicitly agreed on the exact thing to be done, and the exact amount to be paid for failure to do it. The scientific nature of mining in the present day, and the certainty of scientific conclusions from exploration of neighboring territory, may be fully recognized and admitted, but nevertheless, hopeful parties may desire an actual test, and if we are to take notice as counsel suggest, of facts in the history of oil mining we know that some of the most extraordinary and profitable productions have been the result of 'wild-catting' in unpromising fields. But it is enough for us that the parties have contracted for one thing to be done and the damages for not doing it. Under such circumstances it is never open to the covenantor to say that the thing would be of no value to the covenantee if it were done."²⁶⁷

Where the agreement was that a well should be completed within a year, and if not, an annual rental paid; if the rental was not paid, the lease to be null and void; and a second well to be completed within two years, and on failure to drill it, a certain sum to be paid or the lease forfeited, it was held to be no defense, in an action to recover their several sums that there was no oil or gas on the leased premise, and for that reason the lease became void and of no effect. The basis for the decision was that the lessor and lessee had fixed upon a test, which was the drilling of two wells; and that no other could be substituted by the lessee without the lessor's consent. It was admitted, however, that the lease could have been so drawn as to admit the defense attempted to be set up by the lessee, namely, by showing otherwise than by test wells that there was no oil or gas in the leased premises.²⁶⁸ If the lease provides for a test

²⁶⁷ *Cochran v. Pew*, 159 Pa. St. 184; 28 Atl. Rep. 219. See *Springer v. Citizens' National Gas Co.*, 145 Pa. St. 430; 22 Atl. Rep. 986.

²⁶⁸ *Gibson v. Oliver*, 158 Pa. St. 277; 27 Atl. Rep. 961; *Johnston, etc., R. R. Co. v. Egbert*, 152 Pa. St. 53; 25 Atl. Rep. 151.

well, and one is drilled which proves to be a dry well, yet the lessee is bound to bore other wells until he has fully developed the territory.²⁶⁹ If two wells were to be put down by a certain time, the putting down one well, which proved to be a dry well, will not relieve the lessee from the payment of rent, when two wells were to be put down by a certain time or rent to be paid.²⁷⁰ If there be several tracts of land leased, with a royalty for each well, each tract will be treated as a separate tract, and a well must be put down for each of them or rent be paid.²⁷¹ If the lease bind the lessee to test the land within three years, and to work it within a reasonable time, both provisions are conditions on which the lease depends.²⁷² The test well cannot be put down on an adjoining premises, especially if some distance from the line of the leased territory; but it must be put down on the premises leased.²⁷³ An instrument conveyed the oil and gas under forty acres of land, with the right to enter and drill and operate for oil or gas, and maintain all structures and lay all pipes necessary for its production and transportation, and leasing one acre for a test well, with a provision that the lessee should commence operations within thirty days, and complete a well in thirty days after drilling was commenced, and if he failed to do so, he should pay annually a specified price "per acre" until the well was completed; it was held that if no well was completed, the lessee must pay the price fixed "per acre" for forty acres, instead of only one acre.²⁷⁴

§ 124. Test well, when need not be drilled.

Notwithstanding from what has been said concerning the duty to drill a "test well," it has been held that the circum-

²⁶⁹ *Aye v. Philadelphia Co.*, 193 Pa. St. 451; 44 Atl. Rep. 555; *Powers v. Bridgeport Oil Co.*, 238 Ill. 397; 87 N. E. Rep. 381.

²⁷⁰ *Abrns v. Chartiers Valley Gas Co.*, 188 Pa. St. 249; 41 Atl. Rep. 739.

²⁷¹ *Johnston, etc., R. R. Co. v. Egbert*, 152 Pa. St. 53; 25 Atl. Rep. 151.

²⁷² *Petroleum v. Coal, etc., Co.*,

89 Tenn. 181; 18 S. W. Rep. 65.

²⁷³ *Carnegie Natural Gas Co. v. Philadelphia Co.*, 158 Pa. St. 317; 27 Atl. Rep. 951.

²⁷⁴ *Columbian Oil Co. v. Blake*, 13 Ind. App. 680; 42 N. E. Rep. 234.

As to time to return and make further developments, under peculiar circumstances, see *Henne v. South Penn. Oil Co.*, 52 W. Va. 192; 43 S. E. Rep. 147.

stances may be such as to excuse the drilling of such a well. Thus, several owners of leases divided them. Several of these owners, who became defendants in a suit, gave the other owners, who became the plaintiffs, an agreement binding themselves to pay one thousand dollars if the oil wells on the premises transferred to them should be unproductive; and an unproductive well was defined as one in which oil was not produced in paying quantities. Without drilling any well, the plaintiffs sued the defendants on the contract, alleging that the territory was unproductive; and to prove that assertion, offered evidence that the wells drilled through the stratum in which oil, when found in that county (and it seldom was found), cost about three thousand dollars, and even then only a trace of oil had been discovered. It was held that this was sufficient to show that the wells would be unproductive and dry, and to excuse the plaintiffs from digging a well in order to demonstrate the barrenness of the premises in the production of oil. In passing on the case the following language was used:

“ If the testimony establishes the proposition that the plaintiffs pushed their investigations sufficiently to show that neither the Nelson nor Dodson well was one in which oil could be produced in paying quantities, they are entitled to recover. Their right cannot be defeated by proof that a trace of oil was discovered or even by proof that one of the wells might be made to produce a few barrels, for such production was not sufficient to make it a paying well. The Nelson well was put down 1,600 feet. The Dodson well 1,377 feet. Oil in Allegheny County is found, if at all, in the third sand. Both of these wells were drilled through the third sand, and little, if any, oil was discovered. Subsequent developments still further demonstrated their unproductiveness. They are surrounded by a circle of dry holes. No oil has been found in their vicinity. The plaintiffs are criticised because the wells ‘ were not shot, torpedoed or tubed,’ but it would seem that it is not necessary to do this unless the drilling shows some promise of oil. A torpedo may make oil flow more freely, but it will not produce oil from barren sand. There was no possible motive for the plaintiffs to omit anything required to make the wells a success. It was manifestly

for their interest that the wells should pay. There is no direct proof as to the amount to be paid for drilling the two wells, but if it were at the rate which the evidence shows was paid for similar wells in Allegheny County, the plaintiffs were obligated to pay nearly \$3,000. The comparatively small sum which they were to receive from the defendants in case the wells proved unproductive was no inducement to them to stop the work until every reasonable test had been made. Every incentive was in this direction. If the wells proved successful, it meant a fortune to the plaintiffs. If they failed, it meant a large loss even after the \$1,000 had been paid by the defendants. I am satisfied that the plaintiffs did all that the agreement required, and that nothing which they could have done would have developed oil in paying quantities in either of the wells in question.” ²⁷⁵

§ 125. Test well.—Depth.

“Can it be said that, in order to commence operations for a test well, the drill must actually commence to penetrate the rock? I do not so understand the meaning of the expression construed in connection with the facts presented by the record. In many places, in order to sink a well it is necessary that some sort of wooden or metallic casing be provided for the purpose of excluding the soil and clay which must be passed through before the rock is reached; and it would hardly be contended that the purchase and provision of the necessary material for such casing or cribbing was not an important step in putting down the well. Webster defines the word ‘operation’ as ‘an effect brought about in connection with a definite plan’; and, in giving the interpretation ordinarily ascribed to the words ‘to commence operations’—that is, applying to the words their common acceptance—I would understand the expression to mean the performance of some act which has a tendency to produce an intended result. For instance, if a man had determined to erect a brick house, and, in pursuance of that design, had quarried the rock on his own land to be used in the cellar walls and foundation, and had burned a kiln of brick on the same premises for the purposes of constructing the walls and chimneys, it

surely could not be said that he had not commenced operations, although the roads might then be in such a condition as to prevent him from hauling the stone and brick to the place he had selected for its location. Another familiar instance that may serve the purpose of illustration is the erection of locks and dams for the purpose of improving navigation by increasing the depth of the water. . . . When the location of the lock has been selected and stone has been quarried and prepared, although it has not been hauled to the location and no excavations have been made to receive it, we would not be warranted in saying that operations had not been commenced for the construction of the lock. And again, where a building has been destroyed by fire, how frequently do we hear it remarked that the owner commenced operations at once for the construction of another by clearing away the debris and contracting for the material with which to rebuild the structure? The terms of the covenant contained in said lease must be regarded as having been complied with, no matter how slightly may have been the commencement of any portion of the work which was a necessary and indispensable part of the work required in putting down the test well.”²⁷⁶

§ 126. Lessor and lessee by mistake locating well on stranger's land.

If the lessee and lessor by mutual mistake locate a well outside of the leased premises and on a stranger's land, the lessor cannot claim any part of the oil or gas as royalty, or rent for the well.²⁷⁷

²⁷⁶ *Fleming Oil and Gas Co. v. South Penn. Oil Co.*, 37 W. Va. 645; 17 S. E. Rep. 203; *Federal Betterment Co. v. Blaes*, 75 Kan. 69; 88 Pac. Rep. 555.

“The company's undertaking to pay the landlord until, in the judgment of the company, ‘oil or gas cannot be found on the premises, or, having been found, has ceased to exist,’ clearly implies an engagement to explore and develop the premises. The stipulation does not contemplate an arbitrary judgment, but an honest one; a judgment that is justifiable by the results of a *bona fide* investigation; such as could only be arrived at by sending down the drill to where the oil or gas is or

should be.” *Consumers' Gas Trust Co. v. Littler*, 162 Ind. 320; 162 N. E. Rep. 320.

Where a contract for an oil and gas lease is *ambiguous* as to what shall constitute a completed well, the *conduct of the parties*, in treating the completion of an unproductive well as an act sufficient to vest in the lessee the right to make further exploration, without additional payment, is conclusive upon the parties. *Smity v. South Penn. Oil Co.*, 53 S. E. 152.

²⁷⁷ *Mays v. Dwight*, 82 Pa. St. 462. See *Marshall v. Mellon*, 26 Pittsb. L. J. (N. S.) 290; 17 Pa. Co. Ct. Rep. 366. As to lessee, see § 35.

§ 127. "Shooting" well.

Unless some statute prevent it, there is nothing to prevent a well owner from "shooting" it, in order to increase the flow of gas or oil, and even though it has the effect to drain the oil or gas from his adjoining neighbor's premises.²⁷⁸ But the owner may not "shoot" his well if it is situated in the center of a thickly populated city where he cannot collect the necessary quantity of explosives to "shoot" it, without endangering the lives and property of those who have no connection with his operations. In such an instance he must be content with such flow of gas or oil as can be obtained without such "shooting"; and an injunction will lie against him to prevent the accumulation or use of the explosives.²⁷⁹ So if a well is situated so close to a dwelling house as to endanger the house or its occupants, or even any building of value, if it be "shot," the owner of such well may not "shoot" it; and if he attempt or threaten to do so, he may be enjoined.²⁸⁰

§ 128. Oil lease, who entitled to gas.

Under a lease giving the right to drill and "gather" "all oil or gases" on the leased premises, in consideration of a part of the oil found, the lessee is entitled to all the gas found.²⁸¹ In passing on this question, the West Virginia Supreme Court used the following language:

"While the grant is for specific purpose of mining for and removing carbon oil and for none other, still there is necessarily included in this grant, all the incidents essentially or naturally pertaining to its enjoyment. Included in these are

²⁷⁸ *People's Gas Co. v. Tyner*, 131 Ind. 277; 31 N. E. Rep. 59; 16 L. R. A. 443; 31 Am. St. 433; *Tyner v. People's Gas Co.*, 131 Ind. 408; 31 N. E. Rep. 61.

²⁷⁹ *People's Gas Co. v. Tyner*, *supra*. *Tyner v. People's Gas Co.*, *supra*.

²⁸⁰ *People's Gas Co. v. Tyner*, *supra*. *Windfall Mfg. Co. v. Patterson*, 148 Ind. 414; 47 N. E. Rep. 2; 37 L. R. A. 381.

²⁸¹ *Eaton v. Wileox*, 42 Hun 61; *Wood County, etc., Co. v. West Virginia, etc., Co.*, 28 W. Va. 210; 57 Am. Rep. 659. But see *Kitchen v. Smith*, 101 Pa. St. 452; *Kier v. Peterson*, 41 Pa. St. 357; *Truby v. Palmer*, 4 Cent. Rep. (Pa.) 925; 6 Atl. Rep. 74; *Palmer v. Truby*, 136 Pa. St. 556; 20 Atl. Rep. 516. See *Burton v. Forest Oil Co.*, 204 Pa. 349; 54 Atl. Rep. 266.

the elements such as light, air and water. And having the legal right to enter upon and occupy any portion of the premises, the appellant could, without becoming a trespasser or incurring any liability to the lessors, use and appropriate anything it might find thereon, which is not the property of another, such as animals *ferae naturae*, or waters percolating through the land, even though by such use and appropriation it may deprive another, having an equal right, of the power to do so. These are not the subjects of absolute property, and being therefore *jure naturae* capable of qualified ownership only, they belong to him who first appropriates them. If the hydrocarbon or natural gas now in controversy belongs to the class of things which are incapable of being absolute property, but are the subject of qualified property only, such as those above mentioned, then it is clear this gas was not the property of the plaintiff, and the appellant was not liable for its use and appropriation; but if, on the other hand, said gas is susceptible of absolute ownership, then it is a part of the realty of the plaintiff, to which the appellant has no right under said lease, and is, therefore, liable to the plaintiff for the value of the same. The important and decisive inquiry in this cause is, therefore: To which category does hydrocarbon gas belong? In the article on 'Gas and Gas Lighting,' in the Encyclopedia Britannica, it is stated that inflammable gas is formed in great abundance within the earth in connection with carbonaceous deposits, such as coal and petroleum; and similar accumulations not unfrequently occur in connection with deposits of rock-salt; the gases from any of these sources, escaping by means of fissures or seams to the open air, may be collected and burned in suitable arrangements. Thus the 'eternal fires' of Baku, on the shores of the Caspian Sea, which have been known as burning from remote ages, are due to gaseous hydrocarbons issuing from and through petroleum deposits. In the province of Szechuen, in China, gas is obtained from beds of rock-salt at a depth of 1,500 or 1,600 feet; being brought to the surface, it is conveyed in bamboo tubes and used for lighting as well as for evaporating brine; and it is asserted that the Chinese used this naturally evolved gas as an illuminant long before gas lighting was introduced among European nations. . . . It is apparent from this history of the nature and properties of natural gas that it partakes more nearly of the character of the

apparent from this history of the nature and properties of natural gas that it partakes more nearly of the character of the elements, air and water, than it does of those things which are the subject of absolute property. . . . The right of appropriation is so absolute in the case of water flowing under ground that if the owner of land in digging a well or cellar or working a mine on his own premises cuts off the water, which by percolation supplies his neighbor's well and thereby diverts it into his own or drains the well of his neighbor, the latter is without remedy; it is *damnum absque injuria*, if not negligently or maliciously done. If this were an open spring producing oil and gas or such a natural emission of gas as that at Bloomfield, in New York, or that at the Burning Spring, in Wirt County, West Virginia, instead of a well 1,000 feet deep, there could be no more question, it seems to me, as to the right of the lessee to appropriate the gas under the provisions of this lease than there is of his right to consume the air and water upon the premises. What difference, then, is there between these cases and the well in question, which was opened in express conformity with the written terms of the lease? It is the same as if the well had been there before the lease was made."²⁸²

Where a lease provided that the lessor should receive a certain portion of the oil produced; and also provided that "should any well produce gas in sufficient quantities to justify marketing, the lessor shall be paid at the rate of one hundred dollars per year for such well so long as gas therefrom is sold"; and the lessor brought suit to recover the gas rental, alleging that the lessee had marketed and sold gas from a well, it was held that an expert might testify to the necessity of removing the gas in order to successfully operate the well for the production of oil, as showing that the removal of the gas was consistent with the denial of the lessor's right to collect a rental therefor.²⁸³

²⁸² Wood County, etc., Co. v. West Virginia, etc., Co., 28 W. Va. 210; 57 Am. Rep. 659. *Contra*, Kitchen v. Smith, 101 Pa. St. 452.

²⁸³ Shewalter v. Hamilton Oil Co., 28 Ind. App. 312; 62 N. E. Rep. 708.

§ 129. Oil lease gives no right to gas if oil be not found.

If a lease be executed for the purpose alone of drilling for oil, and oil be not found, though gas be found, the lessee cannot insist that the lease has not terminated, on the ground that he had succeeded in developing a paying gas well or wells; and the lessee is not even entitled in equity to reimbursement, for the expense of his operations, out of the proceeds of the gas obtained. In passing on this question the court said: The lease "expressly declares the property shall be occupied and worked for petroleum, rock or carbon oil, and shall not be occupied or used for any purpose whatever; and if no oil is found in paying quantities within four years from this date"²⁸⁴ the lease shall be null and void. Oil was not found. It would be a clear perversion of language to hold that oil and gas are synonymous terms. The evidence is insufficient to prove that the word gas was omitted from the lease through fraud, accident or mistake. The doctrine of equitable estoppel is not applicable to the facts."²⁸⁵ On the second branch of the proposition above stated, this same court used the following language:

"The rights of the parties are determined by their contract, which is a law of their own making. It is a speculative contract, wholly at the risk of the lessees. If they obtain oil they make a profit, in some instances a very large one; while if they fail, the loss is wholly their own. They have no right to be reimbursed by the lessor, or out of their property, under any circumstances whatever. As before observed, it was a speculation pure and simple, in which the lessees assumed all the risk. They did so for the chance of getting seven-eighths of the oil. Upon what principle of equity can this risk be shifted upon the lessors, and they be required to pay for the expenditures which the lessees agreed to make at their own risk? It will be seen at a glance that there is no analogy between such case and that of a person who is in possession of land, under color of title, and innocently builds a house or barn, or makes other valuable and

²⁸⁴ The date of the lease.

²⁸⁵ *Truby v. Palmer*, 4 Cent. Rep (Pa.) 925; 6 Atl. Rep. 74.

permanent improvements upon it. In such case, in an action for the *mesne* profits, he may justly be allowed for the value of such improvements to the extent they have increased the value of the property. But here, the lessees did nothing but what they agreed to do at their own risk.²²⁸⁶

§ 130. Eviction.—Ejectment.(a)

If the lessor convey the leased premises to a third person, and the deed of conveyance is not made subject to the lease, there is a technical eviction of the lessee;²⁸⁷ but if the grantee had knowledge of the lease, the lessee's rights are not lost, and there is no breach of a covenant of warranty.²⁸⁸ The erection by the lessor of a building on the part of the land to be occupied by the lessee, but which does not interfere with his operations, is not an eviction.²⁸⁹ If the lease be made of a large tract, but the lessee is to occupy only a certain portion of it for his operations, he cannot maintain ejectment for such portions as he does not occupy.²⁹⁰ And the assignee of a lease,

²⁸⁶ *Palmer v. Truby*, 136 Pa. St. 556; 20 Atl. Rep. 516. See also *Beatty-Nickle Oil Co. v. Smethers*, 49 Ind. App. 602; 96 N. E. 19.

A lease gave the right to drill for oil and gas, and contained a provision for a certain rental if gas was obtained, without any distinction as to whether the gas was derived from gas or oil wells. It was held that evidence was not admissible to show that the word "gas," as used in the lease, in trade meant gas derived from a gas well, and not gas derived from an oil well. *Burton v. Forest Oil Co.*, 204 Pa. 349; 54 Atl. Rep. 266.

A stipulation in an oil lease that if the lessee brings in an oil well he shall have the right to exploit the land, does not give him the right to exploit it where he only brings in

a gas well. *Cooke v. Gulf Refining Co.*, 127 La. 592; 53 So. 874; *Ball v. Freeman* (W. Va.), 87 S. E. 91. (a) Forfeiture § 924.

²⁸⁷ *Matthews v. People's Natural Gas Co.*, 179 Pa. St. 165; 36 Atl. Rep. 216. § 892, note 8.

²⁸⁸ *Sanders v. Rowe* (Ky.), 48 S. W. Rep. 1083; 20 Ky. L. Rep. 1082; *Ream v. Goslee*, 21 Ind. App. 241; 52 N. E. Rep. 93; *Lake v. Dean*, 28 Beav. 607; *Demars v. Koehler*, 60 N. J. L. 314; 38 Atl. Rep. 808.

²⁸⁹ *Matthews v. People's Natural Gas Co.*, 179 Pa. St. 165; 36 Atl. Rep. 216.

²⁹⁰ *Duffield v. Hue*, 129 Pa. St. 94; 18 Atl. Rep. 566; *Jones v. Mount*, 30 Ind. App. 59; 77 N. E. Rep. 1089; *Duffield v. Rosenzweig*, 144 Pa. 520; 23 Atl. 4.

Solid mineral under the soil may

with a right to enter on the premises leased to mine for oil and gas, cannot maintain ejectment against the lessee in a subsequent lease.^{290a} Ejectment, however, lies in favor of a lessee to recover possession from which he has been unlawfully deprived of the possession.²⁹¹ If a lessee goes into possession of premises already leased for the same purpose but accepts from the first lessee a sum of money on account of damages, and contracts with him as to damages in the future, he cannot defend against the payment of rent on the ground that he has been evicted by his landlord.²⁹² But a mere right to explore

be the subject of an action of ejectment. *Kirk v. Mattier*, 140 Mo. 23; 41 S. W. Rep. 252.

^{290a} *Gillespie v. Fulton Oil & Gas Co.*, 236 Ill. 188; 86 N. E. Rep. 219; *Kelly v. Keys*, 213 Pa. 296; 62 Atl. 911; 110 Am. St. 547; *Gillespie v. Fulton Oil Co.*, 236 Ill. 188; 86 N. E. 219; *Priddy v. Thompson*, 204 Fed. 955; 123 C. C. A. 277. Such, at least, is the Illinois rule. *Guffey v. Smith*, 237 U. S. 101; 35 Sup. Ct. 526; 59 L. Ed. 856; reversing 202 Fed. 106; 120 C. C. A. 436.

²⁹¹ *Erskine v. Forest Oil Co.*, 80 Fed. Rep. 583; *California Oil Gas Co. v. Miller*, 96 Fed. Rep. 12; *Messimer's Appeal*, 92 Pa. St. 168; *Long's Appeal*, 92 Pa. St. 171; *Barnsdall v. Bradford Gas Co.*, 225 Pa. 338; 74 Atl. Rep. 207; *Chandler v. Hart*, 161 Cal. 405; 119 Pac. 516 (by the sublessee against the lessee); *Bartley v. Phillips*, 165 Penn. 325; 30 Atl. 842; *Bartlett v. Phillips*, 179 Penn. 175; 36 Atl. 217; *Hicks v. American, etc., Gas Co.*, 207 Penn. 570; 57 Atlantic 55; 65 L. R. A. 200; *Williams v. Fowler*, 201 Penn. 336; 50 Atl. 969. If the lessor terminates the lease and takes possession of the premises and the lessee's personal property thereon, the latter cannot maintain an action of ejectment in order to recover his property, but the court

will direct judgment in favor of the lessee without prejudice to the lessor's right to maintain an action against the lessor for taking the personal property. *Cassell v. Crothers*, 193 Pa. 359; 44 Atl. 446.

²⁹² *Horberg v. May*, 153 Pa. St. 216; 25 Atl. Rep. 750.

Where the purchaser of an oil lease has sold half of the property and is gradually disposing of the remainder, he has elected not to ask for a rescission of the sale, and where there is danger of eviction, can require a bond from the seller only for that part of the property as to which there is danger of eviction; and where the seller of an oil lease sues for absolute judgment, and the purchaser pleads danger of eviction, and the seller does not ask to give bond, and the purchaser does not ask that he do so, the prayer for an absolute judgment includes a prayer for a judgment conditioned on the stay of execution until danger of eviction has ceased or a bond has been furnished. *Jennings-Heywood Oil Syndicate v. Home Oil & Development Co.*, 113 La. 383; 37 So. 1.

In an adverse suit to determine the ownership of an oil placer mining claim, the parties stand upon their own rights, and must *recover on the strength of their own claims*;

for gas on a grant of the oil and gas beneath the surface will not enable the grantee or lessee the right to maintain an action of ejectment to secure the possession of the premises or so much thereof as is necessary to enable him to drill and operate a well. "It vests no title to any oil or gas which he does not extract and reduce to possession, and hence no title to any corporeal right or interest. It is therefore insufficient to maintain ejectment by grantee who has never taken possession of the land or prospected for or found any oil or gas under it."^{292a} Upon a covenant in a lease that the lessee shall drill a well within a specified time, and on failure so to do shall pay the lessor a stated sum per annum until the well is commenced, the lessor cannot recover an ejectment for such failure to drill the well, where the lease contains no clause providing for a forfeiture of the lessee's rights upon his failure to keep his agreement to drill a well.^{292b} If the plaintiff rely upon his lease to gain possession, it may be shown in defense that he had abandoned or forfeited it.^{292c}

§ 131. Failure of title, reimbursement of operator.

If a person in possession of oil land, in good faith believe he has good title thereto, either by way of ownership or as lessee, and under that belief drill a well or wells; and afterwards he lose possession, in an action of ejectment; he may retain out of the proceeds of the oil or gas produced during his occupancy a sufficient amount to reimburse himself for the cost of drilling the well. In discussing this case, the Supreme Court of Pennsylvania said:

"If this is a kind of improvement of an unusual character and one which particularly commended itself to the favorable opinion of the courts. It was an oil well with all the machinery and appliances necessary to its operation. Now, without this well and machinery, the oil could not possibly be obtained.

and if neither party establishes a right to possession, a judgment to that effect must be made. *Phillips v. Brill*, 17 Wyo. 26; 95 P. 856.

^{292a} *Priddy v. Thompson*, 204 Fed. 955; 123 C. C. A. 277; *Watford Oil & Gas Co. v. Shipman*, 233 Ill. 12; 84 N. E. 53; 122 Am. St. 144; *Gillespie v. Fulton Oil & Gas Co.*, 236 Ill. 188; 86 N. E. 219; *Union Petroleum Co. v. Bliven, etc.*, Coal Co., 72 Penn. 173.

The Federal Courts follow the rule prevailing in the state where the cause of action arose. *Guffey v. Smith*, 237 U. S. 101; 35 Sup. Ct. 526; 59 L. Ed. 855; reversing 202 Fed. 106; 120 C. C. A. 436; *Guffey v. Smith*, 237 U. S. 120; 35 Sup. Ct. 532; 59 L. Ed. 866.

^{292b} *Thompson v. Christy*, 138 Penn. 220; 20 Atl. 934.

^{292c} *Garett v. South Penn. Oil Co.*, 66 W. Va. 587; 66 S. E. 741.

After it was completed its operations were all for the benefit of the plaintiffs. They have actually received the entire advantage of its structure and maintenance without a penny cost to themselves and without any risk. All the cost and all the risk were borne by the defendants. . . . Obtaining oil from the bowels of the earth is a very different thing from obtaining crops from the surface of the ground. The oil exists only at a distance of hundreds of feet below the surface. If it is not developed by means of wells it is the same as if it had no existence at all. It is in a state of nature, of no use or value to the owner of the land. . . . Therefore, it is no hardship to them to repay to the defendants the bare cost of the well and appliances which belong to the plaintiffs now, and the whole benefits of which accrue to them alone. . . . It has cost the plaintiffs nothing, and we know of no good reason, in law or morals, why the reasonable claim of the defendants should not be allowed. . . . It is not a question of staying waste, but of allowance for the cost of valuable improvements actually necessary and made in good faith. For such improvements compensation is allowed, whether that which is taken be mineral, oil or other substances of the land or not."²⁹³

§ 132. Lessee denying tenancy.

The rule that a tenant cannot deny his landlord's title does

²⁹³ Phillips v. Coast, 130 Pa. St. 572; 18 Atl. Rep. 998.

In Louisiana a purchaser cannot suspend the payment of the price of oil because of a danger of eviction, of which he was informed at the time of the purchase. But danger of eviction justifies the suspension of payment of the price of an oil lease only until the seller has furnished bond. In all other cases where payment is refused, the seller is entitled to judgment, subject to stay until the danger of eviction has passed or the bond has been furnished. Jennings-Heywood Oil Syndicate v. Home Oil & Development Co., 113 La. 383; 37 So. 1.

Rent paid under a lease on land on which the lessee could not safely enter on account of doubtful title in the lessor, is recoverable as money paid on a consideration that

has partially failed, when paid without knowledge of the facts showing a defect in the lessor's title. Gaffney v. Stowers, 73 W. Va. 420; 80 S. E. 501 (the complaint in this case was held insufficient as a count for breach of the covenant, but sufficient as one for money paid on a consideration that had partially failed).

The covenant for quiet enjoyment in the lease is not broken by the mere fact, alone, that the lessor makes another lease during the term of the premises, whether the first lessee be in actual possession or not; the second lessee not entering. Knotts v. McGregor, 47 W. Va. 566; 37 S. E. 899.

A defect in the title may excuse lack of diligence in the development of the leased premises. Pyle v. Henderson, 65 W. Va. 39; 63 S. E. 762.

not embrace an oil or gas lease which the lessor had no right to give, if neither the lessee nor his assignee ever took possession or executed any powers or rights under it.²⁹⁴ Where a son joined in a lease with his father of the latter's farm, he being of full age and living on the farm with his father, and the royalty reserved to both of them was delivered to the father and his vendee, it was held, in an action brought by the son against the lessee to recover one-half of the royalty, that the lessee could show the circumstances under which the son signed the lease, not to deny the landlord's title, but to deny, as to the son, that the lease created the relation of landlord and tenant.²⁹⁵ If a lessee take a second lease of the premises from a person claiming adversely to the first lessor, he cannot refuse to pay rent under the second lease on the ground that the first lessor had the better title.²⁹⁶

§ 133. Uncertainty on lease.—Unconscionable.

If a lease be uncertain in its terms, and those parts in which it is not uncertain are unconscionable towards the party seeking to escape from its obligations, the court will seize upon such uncertainty in order to declare it void.²⁹⁷

§ 134. Diameter of wells.

A contract by a well driller to drill a well of a certain diameter is not substantially performed by boring one of less diameter, without any other excuse except to save time and expense,

²⁹⁴ *Marshall v. Mellon*, 26 Pittsb. L. J. (N. S.) 290; 17 Pa. Co. Ct. Rep. 366; affirmed 179 Pa. St. 371; 36 Atl. Rep. 201; *Rives v. Gulf Refining Co.*, 133 La. 178; 62 So. 623. See *Mays v. Dwight*, 82 Pa. St. 462.

²⁹⁵ *Swint v. McCalmont Oil Co.*, 184 Pa. St. 202; 38 Atl. Rep. 1020.

A lessee cannot compromise with an assailant of the lessor's title, and use that as a defense to an action to recover royalty. *Chambers v. Smith*, 183 Pa. St. 122; 38 Atl. Rep. 522.

²⁹⁶ *Hamilton v. Pittock*, 158 Pa. St. 457; 27 Atl. Rep. 1079.

Where the common lessee of adjoining tracts took possession of a

particular part of the leased premises, and put down an oil well and also put up a notice under what lease the well was drilled, and for more than ten years paid royalties to the lessor, designated in such notice, it is held he was not estopped, after the statute of limitations had run, to deny the other lessor's title, though the well was located on his premises. *Lockwood v. Carter Oil Co.*, 73 W. Va. 175, 80 S. E. 814.

²⁹⁷ *Eaton v. Wileox*, 42 Hun 61; *Stahl v. Van Vleck*, 53 Ohio St. 136; 41 N. E. Rep. 35; 33 Wkly. L. Bull. 335. See also *Federal Oil Co. v. Western Oil Co.*, 121 Fed. 674; 57 C. C. A. 428.

although for the purpose of testing the territory, a smaller well may be as effectual as a larger one would be.²⁹⁸ Unless the lease require the lessee to drill a well of a specified diameter, he has the right to determine the diameter of the well, limited, however, by the general rule that the diameter must be one that is great enough to furnish oil or gas in paying quantities, if that amount should be discovered. Or in other words, the diameter must be such as is in common use in oil or gas regions, and which common experience has shown to be necessary to produce good results.

§ 135. Contract to drill wells "in the vicinity."

A well driller offered to drill an oil well upon any one of the lessee's several leases that it should select. He also proposed, "If you decide to drill any more wells upon said leases or in the vicinity, . . . I am to have the contract." At the end of this written offer was written, "Accepted, contract to be drawn in accordance with the above proposition or bid," and after these words were written, "This is about right, and will be satisfactory to the Pittsburgh Company." A well was dug by the driller, without any contract being executed which proved to be a dry one. The lessee then abandoned the enterprise of sinking wells on about one thousand acres of contiguous lands held by it by lease, and on which the dry well had been sunk, but began sinking wells two miles away from the territory abandoned. It was held that the contract to drill wells did not cover the territory two miles away, for it applied only to lands "in the vicinity," and the lands two miles away was not "in the vicinity."²⁹⁹ In an action to recover damages for a breach of a contract to drill an oil well to a greater depth than that required by a prior contract, the measure of damages was held to be the expense or disbursement incurred under the second contract, and for any loss suffered as a direct result of the breach, which was not speculative nor contingent and was

²⁹⁸ Gillispie Tool Co. v. Wilson,
123 Pa. St. 19; 16 Atl. Rep. 36.

²⁹⁹ Sparks v. Pittsburg Co., 159
Pa. St. 295; 28 Atl. Rep. 152.

capable of definite ascertainment; and in the absence of such disbursements or loss, nominal damages only could be recovered. It was also held error for the court to leave the question of damages to the jury as a mixed question of law and fact, without any instruction by which they should measure the damages.³⁰⁰ If a contract require a well to be drilled in a good and workmanlike manner, the contractor is not required to put it in a complete condition for permanent preservation by placing therein a packer and tubing and removing salt water from it. And if the contract requires it to be sunk to the Mississippi limestone, in Kansas, unless a good quantity of oil or gas be struck or otherwise at the option of the employer, the contractor agreeing to do the drilling in a good and workmanlike manner, and the employer agreeing to pay one dollar per foot for the drilling, the contractor is entitled to the contract price for drilling the well when he reaches the Mississippi limestone, if he has done the work in good and workmanlike manner.³⁰¹ So where the contractor agreed to furnish to his employer statements of the strata through which the drills passed, it was held not to be error to instruct the jury that substantially correct information would be sufficient, if there was no evidence that he did not furnish correct reports.³⁰² A contract, whereby plaintiff was to bore an oil well for defendant, provided that in the event that plaintiff should have expended the amount received by him from defendant in drilling the well, and the required depth had not been reached, plaintiff should not be obligated to spend any more money, and that it should be optional with defendant whether he should continue the drilling or abandon the same, and that if the well should be taken over by defendant, and the drilling continued, defendant should not be required to pay any more than the actual cost and have free use of plaintiff's drilling outfit. It was held that the contract meant that, if the well was taken over by defendant on the contingency referred to, and any further boring was done, it should be done by plaintiff, with no charge for the use of his machinery and did not give de-

³⁰⁰ Gayton v. Day, 178 Fed. Rep. 249.

³⁰¹ Collier v. Munger. 75 Kan. 550; 89 Pac. Rep. 1011.

³⁰² Runyan v. Punx Sutawney, etc., Co. (Ky.), 102 S. W. Rep. 854;

31 Ky. L. Rep. 588.

fendant the right to take possession of plaintiff's outfit and continue the drilling.³⁰³ A contract required the contractor to drill not less than 2,000 feet of oil wells at so much "per foot sunk," and that he should receive the amount earned for each foot of hole sunk in accordance with "the said scale of prices." It also required that if the drilling should be stopped by his employer before 400 feet had been sunk in any hole, such employer would pay the cost of moving the drilling outfit to another place, in addition to the amount earned for the number of feet sunk, and that, should the work be stopped on any well for any cause after a depth of 400 feet had been sunk, then the contractor should remove his rig at his own cost to the place designated by his employer. The contractor in good faith drilled a hole to a depth of 580 feet, when, by reason of the breaking of the stem of a bit attached to the drill, without the contractor's fault or negligence, the well could not be drilled deeper, and it was thereupon abandoned. It was held that the contractor was entitled to recover the contract price for each foot of the well.³⁰⁴ Where a contract required the employer to furnish casing pipes and shoes, to be delivered on the ground of such sizes as he might select, and that they should be properly inserted and used in the wells by the contractor, and carried to the bottom, if possible, without diminishing the size, except in cases where it was found absolutely unavoidable after the use of under-reamers and other appliances; and the contractor drilled a hole 1,420 feet deep, and, being of the opinion that it was impossible to put eight-inch casing, which he had been using, to a greater depth, and so informed this employer and requested that he furnish six-inch drain pipe for further use, with which report his employer did not comply, and therefore he abandoned the work, it was held that the employer's failure to furnish such pipe constituted a breach of the contract entitling the contractor to recover for the work.³⁰⁵ Where a landowner hired contractors to drill oil and gas wells, and induced them to purchase an additional string of tools and furnish repairs for tools they then had, upon the promise to give them plenty of

³⁰³ *Hammond v. Decker*, 46 Tex. Co., 144 Cal. 670; 78 Pac. Rep. Civ. App. 232; 102 S. W. Rep. 453. 287.

³⁰⁴ *Cook v. Columbian Oil, etc.*,
³⁰⁵ *Cook v. Columbian Oil, etc.*,
Co., 144 Cal. 670; 78 Pac. Rep. 287.

work, it was held that they could recover in damages the expense of moving the extra string of tools from the place of purchase to the landowner's field, and the difference between the purchase price and its reasonable value at the place where it was situated when such landowner broke its agreement, together with the necessary expense of the repairs, provided they were unable to get other wells to drill with their tools after the landowner failed to furnish work.³⁰⁶ Where a landowner agreed to make a conveyance to drillers in consideration of their drilling an oil well, it was held that they were entitled to the conveyance, although water was not kept out of the well, there being no provision in the contract that it should be, but merely that they should drill the well "with proper and necessary casing, perforated at proper places, tubing, pump and all necessary connections thereof put therein to the proper depth to properly pump the said well, and everything completed ready for pumping," and they having complied therewith, and it still being impossible to keep the water out.³⁰⁷ In an action brought by a contractor to recover damages for a breach of a contract to dig gas wells, the testimony of witnesses who have had experience in drilling wells on the same tract of land and other wells in the vicinity, where the strata appears to be the same, and the conditions similar, is competent to show the cost of the work

³⁰⁶ *New Domain Oil & Gas Co. v. Feeley* (Ky.), 107 S. W. Rep. 1185; 32 Ky. L. Rep. 1181.

³⁰⁷ *Vail v. Freeman*, 144 Cal. 356; 77 Pac. Rep. 974.

A contract merely to bore a well for a certain amount, though not guaranteeing the procuring of water, contemplates such procurement, and implies that the contractor agrees to bore at least a reasonable depth therefor; and what such depth shall be, in case water is not sooner secured, is made certain, as though originally specified in the contract, where, on the contractor having bored 300 feet without getting water, the owner of the property insists on his boring 50 feet further, and he

agrees to do so; so that he, not having done so, and not having reached water, is entitled to no recovery.

Where one contracts to bore a well for a certain amount, there being no provision exempting him from performance in any case, and no warranty by the owner, and before reaching water, or a depth which could be considered an unreasonable depth to bore therefor, he, without direction or knowledge of the owner, uses dynamite on the rock, destroying the work already done, and ruining the well, the loss falls on him, and he is entitled to no recovery for work done. *Chapman v. Warden*, 50 Tex. Civ. App. 282; 110 S. W. 533.

contracted for and which has been prevented by the owner.³⁰⁸ In a contract for the boring of oil wells it was provided that the lessee should provide at its cost all materials of every kind to do the work, and all laborers, including laborers and material in erecting and maintaining fixtures, and the lessor agreed to pay one-half of the cost of drilling, casing, and pumping all wells which did not produce a certain amount of oil per day for the first thirty days. It was held that the lessor was chargeable with one-half of the expense of all the preliminary work of preparing the ground, erecting the derrick, placing and connecting the engine and drilling rig, and the like, including one-half the reasonable value of the use of the machinery owned and furnished by the lessee.³⁰⁹

§ 136. Surrender clause and its effect.—Ejectment.—Specific performance.

A surrender clause in a lease giving the lessee a right to surrender his lease is strictly construed.³¹⁰ In Illinois the usual surrender clause giving the lessee an option to surrender at any time is valid, does not create a tenancy at will, nor give the lessor an option to compel a surrender, and does not make the lease void as wanting a mutuality;³¹¹ but the lessee cannot

³⁰⁸ *Fredonia Gas Co. v. Bailey*, 77 Kan. 296; 94 Pac. Rep. 258.

³⁰⁹ *Far West Oil Co. v. Witmer Bros. Co.*, 143 Cal. 306; 77 Pac. Rep. 61.

The measure of damages for a breach of a contract to drill a prospect well for oil or gas to an additional depth is the expenditure under the contract, plus the amount necessary to complete the well above the amount to be paid the contractor, less the amount due him for work already done. *North Healtown Oil & Gas Co. v. Skelley* (Okla.), 158 Pac. 1180.

³¹⁰ *Shaffer v. Marks*, 241 Fed. 139; *Kolachny v. Galbreath*, 26 Okl. 772; 116 Pac. 902; 38 L. R. A. (N. S.) 451.

The printed parts of a lease provided that the lessee might surrender it, and all liability thereafter should cease. The written part of it provided that the lessor should have gas from a well "so long as it was marketed from said well." It was held that the lessee could not, by surrendering the lease, escape liability for a failure to furnish gas. *Amsell v. Cherry Gas & Oil Co.*, 145 N. Y. Sup. 825.

A cash bonus of \$120 was held to support each and every promise of an Oklahoma surrender clause. *Shaffer v. Marks*, 241 Fed. 139.

³¹¹ *Guffey v. Smith*, 237 U. S. 101; 35 Sup. Ct. 525; 59 L. Ed. 855; reversing 202 Fed. 105; 120 C. C. A. 436; *Bruner v. Hicks*, 230

maintain an action in ejectment to recover possession of the leased premises.³¹² In Illinois, while the courts will enforce in equity a lease that has no surrender clause in it,³¹³ they will not so enforce one that gives the lessee the option to surrender. The ground of the distinction is, although the surrender clause is valid and does not affect the validity of the lease itself, yet it renders it so lacking in mutuality that equity will remit the lessee to his remedy at law.³¹⁴ But the Supreme Court of the United States declined to adopt this rule, even in an instance of an Illinois lease on the ground, "Whenever a case in equity may arise and be determined under the judicial power of the United States, the same principles of equity must be applied to it, and it is for the courts of the United States, and for this court in the last resort, to decide what those principles are, and to apply such of them, to each particular case, as they may find justly applicable."³¹⁵ The court then held, although ejectment would not lie by reason of the surrender clause, against the second lessee, yet the earlier lessee might maintain a suit in equity in the Federal Courts, to restrain the second lessee and for an accounting and discovery, even though the suit could not be maintained in the State Courts, he having no other adequate remedy. The court said that according to the general principles and rules of equity enforced in the Federal Courts, a clause in a lease permitting the lessee to surrender it is not an obstacle to enforcing the lease in equity against those who, under a later lease, are committing waste. The court further said that whether a lease is so unfair and inequitable that it cannot be enforced by the lessee in equity must be determined in view of the circumstances under which it is given; and that an oil and gas lease of undeveloped land requiring all expenses to be paid by the lessee and providing for reasonable royalty and fixed rentals

Ill. 536; 82 N. E. 888; Watford Oil & Gas Co. v. Shipman, 233 Ill. 9; 84 N. E. 53; 122 Am. St. 144; Poe v. Ulrey, 233 Ill. 56; 84 N. E. 46; Ulrey v. Keith, 237 Ill. 284; 86 N. E. 696; Daughetee v. Ohio Oil Co., 263 Ill. 518; 165 N. E. 308.

³¹² Guffey v. Smith, *supra*; Watford Oil & Gas Co. v. Shipman, *supra*; Gillespie v. Fulton Oil &

Gas Co., 236 Ill. 188; 88 N. E. 192; Frank Oil Co. v. Belleview Oil & Gas Co., 29 Okl. 719; 119 Pac. 260; 43 L. R. A. (N. S.) 487.

³¹³ Gillespie v. Fulton Oil & Gas Co., *supra*.

³¹⁴ Guffey v. Smith, *supra*.

³¹⁵ Guffey v. Smith, *supra*; quoting from Neves v. Scott, 13 How. 268.

during a designated period of delay was not so unfair and inequitable as to require equitable relief to be withheld, even where it contained a provision permitting the lessee to surrender it at any time.³¹⁶ But where it is sought to specifically enforce a lease containing a surrender clause, or contract for a lease in which a clause to that effect is to be inserted in the proposed lease, the courts will refuse relief on the ground that the parties are not mutually bound.³¹⁷ A lease containing a surrender clause is a valid and enforceable contract, when resting upon a sufficient consideration; and the lessor has not the right to decline to accept rental made in accordance with its terms, and cancel it within the period the lessee has the right to pay rentals to keep it alive.³¹⁸

³¹⁶ *Guffey v. Smith, supra.*

"Some criticism is directed against the reserve option to surrender, but it is difficult to perceive how it could be declared inequitable. If it was exercised the lessee would be bound by his covenants, and if exercised the lessor would be free to deal with the premises as he chose. A surrender was not to affect any existing liability, but only to avoid those thereafter to accrue. A like clause is in the subsequent lease and according to the evidence and several reported decisions is of frequent occurrence in such instruments. We conclude that there is nothing in the terms of the lease which requires that equitable relief be withheld." *Guffey v. Smith, supra.*

In this case there was a default in the rentals, but not when the second lease was given, yet this was held not to defeat the right to an injunction, to a discovery, and to an accounting. To same effect concerning relief in equity is *Shaffer v. Marks*, 241 Fed. 139.

³¹⁷ *Kolachny v. Galbreath*, 26 Okl. 772; 110 Pac. 902; 38 L. R. A. (N. S.) 451; *Watford Oil Co.*

v. Shipman, 233 Ill. 9; 84 N. E. 53; 122 Am. St. 144; *Grummett v. Gingrass*, 77 Mich. 369; 43 N. W. 999; *Ulrey v. Keith*, 237 Ill. 284; 86 N. E. 696.

In the *Watford Oil* case it was said; "It is not essential to determine in this case as to whether such an option would be valid at law; it is obvious that under the authority heretofore cited, which seems to be supported by reason, equity will not be decree that one party specifically perform a contract which the other party at its option may refuse to carry out. After the relief by decree be granted to such party, he then under the cancellation clause of the lease would have it within his power to modify the decree by exercising his right thereunder not to proceed further. A court of equity will not do a vain and useless thing by rendering a decree settling the rights of parties which one of them may at will set aside."

³¹⁸ *Shaffer v. Marks*, 241 Fed. 139; *Brewster v. Lanyon Zinc Co.*, 140 Fed. 807; 72 C. C. A. 213. The *Shaffer* case construes *Superior Oil & Gas Co. v. Nehlin*, 25 Okl. 809;

§ 137. Slander of title.

A lessor of oil lands has no cause of action for slander of his title thereto or slander of the character of the property because of statements made by the lessee's agent to the effect that a well drilled on the premises contain no oil in paying quantities, in the absence of a showing that the statement was made to or in the hearing of a third person or persons.³¹⁹

108 Pac. 545; 138 Am. St. 949; *Kolachny v. Galbreath*, 26 Okl. 772; 110 Pac. 902; 38 L. R. A. (New Series) 451; and *Frank Oil Co. v. Belleview Gas and Oil Co.*, 29 Okl. 719; 119 Pac. 260; 46 L. R. A. (N. S.) 487 and finds that they fall far short of holding such leases void, but, upon the other

hand treated such leases as valid, binding contracts, and not conferring upon or reserving to the lessor the right to decline to accept rentals for delay in drilling when properly tendered. For this case see Sec. 76, note 114a.

³¹⁹ *Arnold v. Producers Oil Co.* (Tex. Civ. App.), 196 S. W. 735.

CHAPTER IV.

DURATION OF LEASE.

- § 138. Ordinary leases.
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§ 138. Ordinary leases.

In an ordinary lease the time of its duration is usually specified, so that no trouble arises over the length of time it is to run; but even it may contain so many conditions, "ifs and ands," that it is difficult to determine its life. But in the case of gas and oil leases, there is scarcely a lease in existence that does not contain conditional clauses which are determinative of its duration. Oil and gas leases are almost universally granted upon the condition that they are to terminate when all the oil or gas has been taken out of the leased premises. And almost every oil or gas lease contains a clause requiring the premises leased to be developed, or partially developed, within a specified time, or the demise to terminate; and whether such a clause is inserted or not, the courts hold that the lease is granted upon an implied condition that the premises shall be developed with reasonable diligence,^a and will seek an opportunity to hold that they have been abandoned (though usually not forfeited), if not developed with reasonable celerity.¹

§ 139. Diligent search.—Implied covenant.

It is the duty of the lessee to make diligent search and operation of the leased premises; and it is not necessary that a provision for such search or operation be inserted in the lease; for it is an implied covenant in every oil and gas lease that a diligent search and operation will be prosecuted.² And where

^a What is reasonable diligence is a question of fact, and not of law. *Indiana Natural Gas Co. v. Gainard*, 45 Ind. App. 613; 91 N. E. Rep. 362; *Brewster v. Lanyon Zinc Co.*, 140 Fed. Rep. 801; 72 C. C. A. 213; *Caddo Oil & M. Co. v. Producers Oil, etc., Co.*, 134 La. 701; 64 So. 684. See § 143.

¹ *Parish Fork Oil Co. v. Bridge-water Gas Co.*, 51 W. Va. 583; 42 S. E. Rep. 655; 59 L. R. A. 566; *Gadbury v. Ohio, etc., Gas Co.*, 162 Ind. 9; 67 N. E. Rep. 259; 62 L. R. A. 895; *McKnight v. Natural Gas Co.*,

146 Pa. St. 185; 23 Atl. Rep. 164; 28 Am. St. Rep. 790.

A provision in an oil lease, giving the lessee the exclusive right not only to drill for, but to produce, oil on the leased premises, is construed to apply only to wells drilled in the future. *Doddridge County Oil & Gas Co. v. Smity*, 154 Fed. Rep. 970.

² *Huggins v. Daley*, 99 Fed. Rep. 606; 40 C. C. A. 12; 48 L. R. A. 320; *Allegheny Oil Co. v. Snyder*, 106 Fed. Rep. 764; 45 C. C. A. 604; *Hewitt Iron Mining Co. v. Dessau*

the only consideration was the royalty, a failure on the part of the lessee to commence operations for eight months was held to be an abandonment.³ So where there was a year's delay a like decision was rendered.^{3a}

§ 140. Holding for speculative purposes.

An oil or gas lease cannot be held for merely speculative purposes.⁴ "No lease of land for a rent for a return to the

Co., 129 Mich. 590; 89 N. W. Rep. 365; Tennessee Oil, etc., Co. v. Brown, 131 Fed. Rep. 696; 65 C. C. A. 524; Indiana Natural Gas & Oil Co. v. Ganiard, 45 Ind. App. 613; 91 N. E. Rep. 362; Day v. Kansas City Pipe Line Co., 87 Kans. 617; 125 Pac. 43; Owens v. Corsicana Petroleum Co. (Tex. Civ. App.), 169 S. W. 192; Grass v. Big Creek, etc., Co., 75 W. Va. 719; 84 S. E. 750; Lemar v. Farmer (Ind. App.), 109 N. E. 791.

Where the object of the operations is to obtain a benefit for both lessor and lessee, neither, in the absence of a stipulation, is the arbiter of the extent of diligence required; both are bound by what would be reasonably expected of operations of ordinary prudence, having regard to the interests of both. Brewster v. Lanyon Zinc Co., 140 Fed. Rep. 801; 72 C. C. A. 213.

³ Federal Oil Co. v. Western Oil Co., 112 Fed. Rep. 373.

^{3a} Hodges v. Brice, 32 Tex. Civ. App. 358; 74 S. W. Rep. 590; Mills v. Hartz, 77 Kan. 218; 94 Pac. Rep. 142 (seven years' delay); Murray v. Barnhart, 117 La. 1023; 42 So. Rep. 489 (three years' delay); Cherokee Const. Co. v. Bishop, 86 Ark. 489; 112 S. W. Rep. 189; Brewster v. Lanyon Zinc Co., 140 Fed. Rep. 801; 72 C. C. A. 213 (fourteen months); Tennessee Oil,

etc., Co. v. Brown, 131 Fed. Rep. 696; 65 C. C. A. 524 (fifteen years); Buffalo Valley Oil & Gas Co. v. Jones, 75 Kan. 18; 88 Pac. Rep. 537; Howerton v. Kansas Natural Gas Co., 81 Kan. 553; 106 Pac. Rep. 47; 34 L. R. A. (N. S.) 34, reversed 82 Kan. 367; 108 Pac. 813; Highfield Co. v. Kirk, 248 Pa. 19; 93 Atl. 915 (15 years, abandonment).

Failure of the lessee for two years to develop the premises, after drilling a well, finding gas, and then closing it, was held *prima facie* to authorize the grantor, who was to be paid \$100 per annum for each well while gas was being used off the premises, without demand, to treat the grant as abandoned. Gadbury v. Ohio, etc., Gas Co., 162 Ind. 9; 67 N. E. Rep. 259; 62 L. R. A. 895.

An agreement to "protect lines" and "well develop" the premises adds nothing to the lessee's implied covenant to develop the premises in good faith. Kellar v. Craig, 126 Fed. 630; 61 C. C. A. 366.

⁴ Huggins v. Daley, 99 Fed. Rep. 606; 40 C. C. A. 12; 48 L. R. A. 320; Twin-Lick Oil Co. v. Marbury, 91 U. S. 587; Guffey v. Hukill, 34 W. Va. 49; 11 S. E. Rep. 754; 8 L. R. A. 759; Steelsmith v. Gartlan, 45 W. Va. 27; 29 S. E. Rep. 978; 44 L. R. A. 107; American Window Glass Co. v. Williams, 30 Ind. App. 685; 66 N. E. Rep. 912; McLean v.

landlord out of the land which passes can be construed to be intended to enable the tenant merely to hold the lease for purposes of speculation, without doing and performing therewith what the lease contemplated. Such a construction would, indeed, make all such contracts a snare for the entrapment and injury of the unwary landlord. A man buying and paying for land may do with it as he likes—work it or let it lie idle. But a tenant to whom land passes for a specified purpose has no such discretion; he must perform what he stipulated to do.”⁵

§ 141. Non-development of leased premises where no limit fixed.—Forfeiture.

In many early oil or gas leases no time was fixed when the premises should be developed. It was assumed that the lessee had interest enough in the lease to develop the premises. It seldom occurred to a landowner that a lessee had a lease on adjoining premises by which he could drain the oil or gas from beneath such owner's premises; or that he desired to keep the premises for future use. Forfeiture clauses in such leases were seldom inserted for failure to develop the premises leased. In time the landowner realized that he was getting no benefit out of his land by reason of the oil or gas that he believed or even was morally certain was lying beneath its surface, and he sought a way to avoid the lease. Courts found it essential to the administration of justice to give him

Kishi (Tex. Civ. App.), 173 S. W. 502.

⁵ Rorer Iron Co. v. Trout, 83 Va. 397; 2 S. E. Rep. 713; Munroe v. Armstrong, 96 Pa. St. 307; Baker v. Stow, 30 Ohio Cir. Ct. Rep. 724; New American Oil & M. Co. v. Troyer, 166 Ind. 402; 76 N. E. Rep. 37; 77 N. E. Rep. 739; New American Oil & M. Co. v. Wolff, 166 Ind. 402; 76 N. E. Rep. 255.

A lease of land to search for minerals means a search for all minerals named in the lease which may reasonably be expected to be found

in the land, considering known geological conditions, to such an extent as would not only determine the presence or absence of minerals, but their commercial value, considering their abundance and accessibility. Tennessee Oil, etc., Co. v. Brown, 131 Fed. Rep. 696; 65 C. C. A. 524.

Enough wells must be sunk to develop the land fully. J. M. Guffey Petroleum Co. v. Jeff Chaison Townsite Co., 48 Tex. Civ. App. 555; 107 S. W. Rep. 609; Kellar v. Craig, 126 Fed. Rep. 630; 61 C. C. A. 366.

relief, and lent their powerful aid to him.⁶ It is the duty of the lessee to develop the premises within a reasonable time; and he cannot hold the land for speculative purposes indefinitely, or even for a stated period, for a nominal rent, when a royalty is the chief object for the execution of the lease.⁷ "The fluctuating character and value of this class of property," said the Supreme Court of the United States, "is remarkably illustrated in the history of the production of mineral oil from wells. Property worth thousands today is worth nothing tomorrow; and that which we today sell for a thousand dollars as its fair value, may by the natural changes of a week, or the energy or courage of desperate enterprise, in the same time, be made to yield that much every day. The injustice, therefore, is obvious of permitting one holding the right to assert an ownership in such property to voluntarily await the event, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit. While a much longer time might be allowed to assert this right in regard to real estate whose value is fixed, on which no outlay is made for improvement, and but little change in value, the class of property here considered, subject to the most rapid, frequent and violent fluctuations in value of anything known as property, requires prompt action in all who hold an option, whether they will share its risks or stand clear of them."⁸ Where a gas or oil lease was given for ten years, a certain portion of the oil obtained to be given as royalty, a fixed sum paid annually, and a test well to be

⁶ *Brown v. Vandergrift*, 80 Pa. St. 142; *Island Coal Co. v. Combs*, 152 Ind. 379; 53 N. E. Rep. 452; *Maxwell v. Todd*, 112 N. C. 677; 16 S. E. Rep. 926; *Ohio Oil Co. v. Hurlburt*, 14 Ohio C. C. 144; 7 Ohio Dec. 321, reversing 6 Ohio Dec. 305; *Coffinberry v. Sun Oil Co.*, 68 Ohio 488; 67 N. E. Rep. 1069.

⁷ § 863. *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587; *Huggins v. Daley*, 99 Fed. Rep. 606; 40 C. C. A. 12; 48 L. R. A. 320; *Rorer Iron Co. v. Trout*, 83 Va. 397; 2 S. E. Rep. 713; *Allegheny Oil Co. v. Sny-*

der, 106 Fed. Rep. 764; 45 C. C. A. 604; *Deihl v. Ohio Oil Co.*, 30 Ohio Cir. Ct. Rep. 750; *New American Oil, etc., Co. v. Troyer*, 166 Ind. 402; 76 N. E. Rep. 253; 77 N. E. Rep. 739; *New American Oil, etc., Co. v. Wolff*, 166 Ind. 402; 76 N. E. Rep. 255; *Logan Nat. Gas & Fuel Co. v. Great Southern Gas & Oil Co.*, 126 Fed. Rep. 623.

⁸ *Twin-Lick Oil Co. v. Marbury*, *supra*. See *Coffinberry v. Sun Oil Co.*, 68 Ohio 488; 67 N. E. Rep. 1069. Forfeiture, § 881.

completed within one year from the date of the lease, it was held that the lessee could not dig a test well within the year, and thus vest in himself the privilege to take out oil and gas for ten years in the whole territory; but he was bound, within a reasonable time thereafter, to sink other wells so as to develop the whole territory; and if he did not, he had abandoned or forfeited his right to the whole territory premises. The premises were covered by several separate leases on its several parts, and, of course, the test well was drilled under only one lease. The court held that the other leases were abandoned.⁹ But where the land embraced in a lease consisted of three tracts, and a well was put down on one of the tracts within time, and paying gas found; yet no well was put down on either one of the other two, it was held that there was not a breach of the covenant entitling the lessor to terminate the lease.^{9a} A failure for seven years to put down a test well was considered such laches as to show an abandonment, and the lease was cancelled.¹⁰ A lessor will not be permitted to retain possession of the leased premises for the purpose of exhausting the oil or gas under the surface thereof by means of wells on adjoining land controlled by him, which would drain the oil from the leased premises.¹¹ An owner of land leased his premises to a gas company for ten years, and as much longer as gas was found in paying quantities, or the "rental" was paid as provided. If gas was found in quantities sufficient for manufacturing purposes, the gas company was to pay one hundred dollars per annum for each well from the time gas was used therefrom for such purposes. Until a well was drilled and gas used therefrom by the gas company, it was to

⁹ *Elk Fork Oil and Gas Co. v. Jennings*, 84 Fed. Rep. 839; *Ohio Oil Co. v. Harris*, 1 Ohio N. P. 132; 1 Ohio Dec. 157; *Foster v. Elk Fork Oil and Gas Co.*, 90 Fed. Rep. 178; 32 C. C. A. 560; *Logan Natural Gas & Fuel Co. v. Great Southern Gas & Oil Co.*, 126 Fed. Rep. 623 (four years' delay).

^{9a} *Brewster v. Lanyon Zinc Co.*, 140 Fed. Rep. 801; 72 C. C. A. 213. See page 193, note 262.

¹⁰ *Crawford v. Ritchey*, 43 W. Va. 252; 27 S. E. Rep. 220; *Barnhart v. Lockwood*, 152 Pa. St. 82; 25 Atl. Rep. 237; *Ohio Oil Co. v. Hurlburt*, 14 Ohio Cir. Ct. Rep. 144; 7 Ohio Dec. 321, reversing 6 Ohio Dec. 305; *Hawkins v. Pepper*, 117 N. C. 407; 23 S. E. Rep. 434; *Welty v. Wise*, 5 Ohio N. P. 50.

¹¹ *Kleppner v. Lemon*, 176 Pa. St. 502; 27 Pittsb. L. J. (N. S.) 21; 38 W. N. C. 388; 35 Atl. Rep. 109.

pay fifty dollars a year "rent." It was held that the lease did not continue in force beyond the ten years, by reason of the fact that the lessee completed a paying well, which he closed and anchored, and yet continued to pay the rent.¹²

¹² *American Window Glass Co. v. Williams*, 30 Ind. App. 685; 66 N. E. Rep. 912. See also *Gadbury v. Ohio, etc., Gas Co.*, 162 Ind. 9; 67 N. E. Rep. 259; 62 L. R. A. 895.

A lease granting all the oil and gas under the leased land with the right to enter at all times for drilling and operation, to erect structures, pipe lines, and machinery for the production and transportation of oil and gas, and to use sufficient oil and gas to run the necessary engines, reserving to the lessor royalties in kind and in money on the oil saved and the gas used off the premises, which shows that the promise of these royalties was the inducement to the grant, and which, while requiring the drilling of one well during the first five years, does not define the diligence to be exercised in the development after that period, contains a covenant by the lessee, by implication, that if, during the five allowed for development of oil and gas, one or both are found in paying quantities, the work of development shall be continued with reasonable diligence along such lines as will make the extraction of oil and gas from the leased land of mutual advantage to the lessor and lessee. *Brewster v. Lanyon Zinc Co.*, 140 F. 801; 72 C. C. A. 213.

See where a lessor in a preliminary oil lease was held to have the right to cancel the lease on failure of any driven wells to come up to the contract specifications, though they produce a paying quantity of

oil. *McLean v. Kishi* (Tex. Civ. App.), 173 S. W. 502.

A mineral lease providing that it should operate for 20 years from the discovery of certain minerals and as much longer as minerals should be produced in paying quantities, was held to terminate when the grantee ceased to operate. *Brown v. Producers Oil Co.*, 134 La. 672; 64 So. 674.

Several lessors of several tracts for a gross price, without stating the amount to be paid to each lessor of the land or the land belonging to each lessor, stipulated that drilling operations should be commenced by the lessee within one year, and it was held that such lessee was not required to commence a well within one year upon each tract. *Nabors v. Producers Oil Co.*, 140 La. 985; 74 So. 527; L. R. A. 1917 D 1115.

A gas lease provided that the lessor should have, free of expense, gas from the wells to light and heat his dwellings, and the lessees agreed to furnish the gas on or before November 15th, and the lease also provided that the lessee should have twelve months to drill a well or thereafter pay a yearly rental of \$56 until a well was drilled. Held, that the covenant as to free gas was independent of the covenant as to the time of drilling the well. *Indiana Natural Gas & Oil Co. v. Ganiard*, 45 Ind. App. 613; 91 N. E. 362.

§ 142. Time for termination of lease fixed therein.(a)

If the time for the termination of lease be fixed by the language used therein, then the term will not be extended beyond the time thus fixed.^{12a} Thus where a lease recited that "the term of this grant shall not exceed twelve years," among other conditions, it was held the whole lease terminated at the end of such period.^{12b} So the parties may contract when the operations for oil shall commence; and in the absence of fraud or mistake, it is binding upon them.^{12c} Where the lessee was to commence operations within six months, but the only express stipulation for forfeiture was in case a test well was not completed within three years, it was held that a suit to cancel the lease, brought several months before the three years had expired, could not be maintained, unless it was averred and shown that a well cannot be completed within the limit of the three years.^{12d} So if the lessee has put down the number of wells specified in the lease, it will not be held that there has been a forfeiture of the lease although that number of wells was not sufficient to fully develop the land.^{12e} And where the lessee agreed to drill a test well upon the premises within twelve months from the date of the lease; and "in case no well was completed on the premises within twelve months" from the date of the lease, he was to pay the lessor "a rental of twenty-five cents per acre per year, to be paid annually, counting from the expiration of the said twelve months," it was held that a failure to put down the test well did not terminate the lease; that the rental of the second year was not payable in advance, and that the lessee had the entire second year in which to make his first payment of rent.^{12f} But if the lease be granted for three years, "and as much longer as gas and oil are found in paying quantities," in consideration for which the lessees are to pay a royalty on oil

(a) Waiver of forfeiture, § 183.

^{12a} *Erie Crawford Oil Co. v. Meeks*, 40 Ind. App. 156; 81 N. E. Rep. 518; *Gillespie v. Fulton*, 236 Ill. 188; 86 N. E. Rep. 219; *Indiana Nat. Gas & Oil Co. v. Granger*, 33 Ind. App. 550; 70 N. E. Rep. 395.

^{12b} *Griner v. Ohio Oil Co.*, 26 Ohio Cir. Ct. Rep. 521.

^{12c} *Ringle v. Quigg*, 74 Kan. 581; 87 Pac. Rep. 724.

^{12d} *Armitage v. Mt. Sterling Oil & Gas Co. (Ky.)*, 80 S. W. Rep. 177; 25 Ky. L. Rep. 2262. In this case it was also held that the lease would not be extended upon a mere offer to pay the rental specified.

^{12e} *Kellar v. Craig*, 126 Fed. Rep. 630; 61 C. C. A. 366.

^{12f} *Gillespie v. Fulton Oil & Gas Co.*, 236 Ill. 188; 86 N. E. Rep. 219.

produced and so much per well for gas, and, in case no well be drilled within the first six months, a stipulated rental per year is to be paid, it terminates upon the expiration of the three years unless oil or gas is produced in paying quantities. The payment of a yearly rental and tender of the sum for a non-producing well that was to be paid for a producing well was held not to extend the term of the lease. Nor, it was held, did a separate agreement, upon a consideration entered into three years and eight months after the date of the contract, granting an extension to a fixed date more than a year in the future, the terms of which were endorsed on the original agreement, continue such original agreement in force beyond such fixed date, especially where no new or further efforts were made to develop oil or gas on the premises.^{12g} So where the lease was "for a term of twelve years, and so long thereafter as petroleum, gas, and mineral substance can be procured in paying quantities or the payments hereinafter provided for are made," it was held that the word "or" should be read "and," in order to limit the term to twelve years, unless gas or oil was procured. In this case the thirteenth payment was made and a receipt executed containing the statement "which payment continues said lease in force for another term." It was held that this did not have the effect to continue the term for another twelve years.^{12h}

^{12g}*Northwestern Ohio Nat. Gas Co. v. Whitacre*, 30 Ohio Cir. Ct. Rep. 737.

While the failure in Texas to have a time limit upon a contract of lease for the prospecting and development of oil wells is a ground upon which it might be declared to be void, a limit of ten years during which the lease might be extended by the payment of rentals from quarter to quarter at the option of the lessor, will not establish the validity of such a contract. *Owens v. Corsicana Petroleum Co.* (Tex. Civ. App.), 169 S. W. 192.

Stockholders of an oil company could not enjoin the cancellation of an oil lease because wells driven by virtue of the lease produced a paying quantity of oil, where the lease provided for a greater quantity. *McLean v. Kishi* (Tex. Civ. App.), 173 S. W. 502.

In a lease the operations were to begin within 90 days, but in case the operations did not begin within that time, then five cents per acre was to be paid yearly in lieu of the work, so long as the grantee "desires to operate and hold the same." The lessor was an Indian, and under an act of Congress he could not give a lease for more than ten years. The lease was held valid, but only for ten years. *McCullough v. Smith*, 243 Fed. 823.

^{12h}*American Window Glass Co. v. Indiana Nat. Gas & Oil Co.*, 37 Ind. App. 439; 76 N. E. Rep. 1006. "It would be unreasonable to suppose," said the court, "that in one breath they would be so careful in fixing the time when the leases were to expire and in the next undo all by stipulating for a nominal annual payment to run indefinitely. The twelve-year clause was incorporated

§ 143. Greater diligence required in developing oil than coal lands.

In the development of oil lands greater diligence is required than in the development of coal lands, to prevent a forfeiture or raise a presumption of abandonment. The Supreme Court of Pennsylvania thus speaks of the difference: "The appellant cites *Venture Oil Co. v. Fretts*,¹³ and *McNish v. Stone*,¹⁴ and other cases in which oil leases were considered and the rights of the lessors and lessees defined. A lease granting to the lessee the right to explore for oil and, in case oil is found in paying quantities on the leased premises, to drill wells and raise the oil, paying an agreed royalty therefor, has been held to convey no interest in the land beyond the right to enter and explore, unless the search for oil proves successful. If it proves unsuccessful and the lessee abandons its future prosecution, his rights under the lease are gone. So it might be with a similar lease of lands supposed to contain coal. If the lessee entered, explored the leased premises, and finding nothing gave up the search, he would no doubt be held to the same rules, upon the same provisions in the lease, as were applied in the cases cited. The difference in the nature of the two minerals, and the man-

into the lease for a purpose, and it is the duty of the court so to construe the contracts as to give them effect, if it can be done consistently with the rules of law, to the end, that the intentions and purposes of the parties may be effectuated. To our minds, the language of the leases last above quoted evidences an intention on the part of the lessor to grant to lessee the exclusive right for the term of twelve years to operate upon the land for petroleum, gas, etc., or the right to delay such operation for such term by paying a certain stipulated annual sum as compensation for such delay; but, in case lessee should in the meantime explore such land and procure the granted product in paying quantities, while this condition existed, the lease would continue, although it may go beyond the twelve-year period. The evident intention of the landowner was to have his land developed, and the lessee, by the

twelve-year stipulation in the lease, is given an agreed fixed time within which to develop the land and provide a way of utilizing the mineral substances there obtained. Therefore, had the landowner, at the end of the twelve-year term, notified said appellee that they would not receive any further payments, and refused to accept the same, and before payment to the bank gives it notice not to receive any payments for the oil and benefit on account of these leases, the rights of said appellee would have terminated."

A lease providing that it should remain in force for as long a period as another lease for gas which the lessor was then operating, was held not void for uncertainty and indefiniteness. *Butler v. Iola* (Kans.), 163 Pac. 652.

¹³ 152 Pa. St. 451; 25 Atl. Rep. 732; 31 W. N. C. 432.

¹⁴ 152 Pa. St. 457, note.

ner of their production, has, however, resulted in considerable differences in the forms of the contracts or leases made use of. When oil is discovered in any given region, the development of the region becomes immediately necessary. The fugitive character of oil and gas, and the fact that a single well may drain a considerable territory and bring to the surface oil that, when in place in the sand-rock, was under the lands of adjoining owners, makes it important for each land owner to test his own land as speedily as possible. Such leases generally require, for this reason, that operations should begin within a fixed number of days or months, and be prosecuted to a successful end or to abandonment. Coal, on the other hand, is fixed in location. The owner may mine when he pleases regardless of operations, around him. Its amount and probable value can be calculated with a fair degree of business certainty. There is no necessity for haste, nor moving *pari passu* with adjoining owners. The consequence is that coal leases are for a certain fixed term, or for all the coal upon the land leased, as the case may be. The rule of *Venture Oil Co. v. Fretts*, *supra*, is not capable of application to the lease made by Callender to Meredith in 1828, for several reasons: (1) The Callender lease is in effect a sale of all the coal in the leased premises, and consequently a severance of the surface therefrom. (2) It is for one hundred years. All idea of haste in development or operating is excluded by the terms of the instrument, and the time for commencing the work of mining is left to the discretion of the lessee. (3) The consideration of the grant was not the development of the mineral value of the land, but the price fixed by the agreement and actually paid to the lessor in money.”¹⁵

§ 144. What is a reasonable time.—Question of fact.

What is a reasonable time is a question of fact and not one of law; “for its determination largely depends upon the circumstances surrounding the particular case and the means and ability of the person by whom the contract is to be per-

¹⁵ *Plummer v. Hillside, etc., Co.*, 160 Pa. St. 483; 28 Atl. Rep. 853.

formed.^{15a} Where the facts are undisputed or admitted, or are clearly established, 'reasonable time' has been held to be a question of law; but should the question of reasonable time depend upon controverted facts, or 'where the motives of the party enter into the question, the whole is necessary to be submitted to the jury before any judgment can be formed as to whether the time was or was not reasonable.' ''^{15b} Where the object of an oil lease is to obtain a benefit for both lessor and lessee, neither, in the absence of a stipulation, is the arbiter of the extent of the diligence required; but both are bound by what would be reasonably expected of operators of ordinary prudence, having regard to the interests of both.^{15c}

§ 145. Acquiescence in delay.—Unavoidable accident.

The time of the lease, at least for development of the premises, may be prolonged by the acquiescence of the lessor in the delay. And where the lease provided that a test well should be completed by a given time, "unavoidable accident" excepted, it was held that a recognition by the lessors of the unavoidable character of certain accidents delaying operations, coupled with acquiescence in such delay, was a waiver of the right to enforce the forfeiture clause of the lease.¹⁶ Acquiescence, however, with regard to the time within which a well is to be begun, is not a waiver of the time, within which

^{15a} Citing *Consumers' Gas Trust Co. v. Littler*, 162 Ind. 320; 70 N. E. Rep. 363; *Island Coal Co. v. Combs*, 152 Ind. 379; 53 N. E. Rep. 455, and *Randolph v. Frick*, 57 Mo. App. 400.

^{15b} *American Window Glass Co. v. Indiana Natural Gas & Oil Co.*, 37 Ind. App. 439; 76 N. E. Rep. 1006, quoting 7 Words and Phrases, 5977. *Indiana Natural Gas Co. v. Gainard*, 45 Ind. App. 613; 91 N. E. 362; *Caddo Oil & M. Co. v. Producers Oil Co.*, 134 La. 701; 64 So. 684. See also *Scannell v. American Soda Fountain Co.*, 161 Mo. 606; 61 S. W. Rep. 889; *Bowen v. Detroit City R. Co.*, 54 Mich. 496; 20 N. W. Rep. 559; 52 Am. Rep. 822; *Cameron v. Wills*, 30 Vt. 633; *Graham v. Van Drinen's Land Co.*, 11 Exch. 101.

^{15c} *Brewster v. Lanyon Zinc Co.*, 140 Fed. Rep. 801; 72 C. C. A. 213; *Paraffine Oil Co. v. Cruce* (Okl.), 162 Pac. 716; *Caddo Oil, etc., Co. v. Producers Oil Co.*, 134 La. 701; 64 So. 684.

¹⁶ *Elk Fork Oil and Gas Co. v. Jennings*, 84 Fed. Rep. 839. See *Duffield v. Michaels*, 102 Fed. Rep. 820; 42 C. C. A. 649; *New American Oil Co. v. Troyer*, 166 Ind. 402; 76 N. E. 353; *Duffield v. Hue*, 129 Pa. 94; 18 Atl. 566; *Steiner v. Marks*, 172 Pa. 400; 38 Atl. 695; *Campbell v. Rock Oil Co.*, 151 Fed. 191; 80 C. C. A. 467; *Duntley v. Anderson*, 169 Fed. 391; 94 C. C. A. 647; *Monarch Oil Co. v. Richardson*, 30 Ky. L. Rep. 824; 99 S. W. 668.

it is to complete it.¹⁷ An agreement that the lessee should have further time within which to complete the development of the premises, even if made after the lease has expired, is binding on the lessor.¹⁸ If the lessor is to locate the wells, and he fails to do so, he cannot complain of the lessee's delay in development of the premises.^{18a} So if the lessor drive away the lessee's workmen, he cannot complain of delay.^{18b}

§ 146. Acquiescence in abandonment.—Damages.

If a lessor acquiesce in the action of the lessee in abandoning the leased premises, he will thereby terminate his lease and waive his right to damages accruing after the time of the abandonment. Especially is this true if the acquiescence is evidenced by the lessor taking possession and leasing the premises to third parties, even if the second lease is for another mining purpose.¹⁹

§ 147. Actual mining operations must be commenced.

A lease requiring the work of development to be commenced within a certain time, by drilling wells, requires actual drilling operations to be commenced within the time specified; and the mere erection of drilling apparatus will not be a compliance

¹⁷ *Cleminger v. Baden Gas Co.*, 159 Pa. St. 16; 33 W. N. C. 480; 28 Atl. Rep. 293.

As to endorsement on lease for an extension of an Ohio lease and its recording, see *Northwestern Ohio, etc., Co. v. Browning*, 15 Ohio Cir. Ct. Rep. 84; 8 Ohio C. D. 188.

¹⁸ *Riddle v. Mellon*, 147 Pa. St. 30; 23 Atl. Rep. 241 *Kansas City Nat. Gas Co. v. Harris*, 79 Kan. 167; 100 Pac. 7. § 892, notes.

The acceptance and use of gas by the lessor supplied by the gas company and paid for by it, in consideration for which the lessees are granted an extension of time to open a well producing oil and gas, which by reason of the intermingling of the oil, and for want of marketable facilities of the oil, was unprofitable to operate either for oil or gas, neither extends the terms of the lease nor waives conditions of forfeiture for non-compliance therewith. This is especially true after

the expiration of the term contracted for, and in the absence of a well profitably producing neither oil nor gas. Nor is a failure to notify the lessee to shut off the gas a waiver of the forfeiture after giving notice that the lease has expired. *Miller v. Vandergrift*, 30 Ohio Cir. Ct. Rep. 730.

^{18a} *McKnight v. Manufacturers' Nat. Gas Co.*, 146 Pa. 185; 23 Atl. 164; 28 Am. St. 790.

^{18b} *Henderson v. Ferrell*, 183 Pa. 547; 38 Atl. 1018.

¹⁹ *May v. Hazlewood Oil Co.*, 152 Pa. St. 518; 25 Atl. Rep. 564.

The lessor by permitting the lessee to expend large sums of money in developing oil property, may waive his right to declare a forfeiture provided for by the lease. *Owens v. Corsicanna Petroleum Co.* (Tex. Civ. App.), 169 S. W. 192. See also *Indiana Oil and Gas Co. v. McCrory*, 42 Okl. 130; 140 Pac. 610.

with its terms.²⁰ But the commencement of operation on the last day within which the lease required them to be begun prevents a forfeiture.^{20a}

§ 148. In paying quantities.(a)

A very common expression in oil and gas leases is that they are to continue so long as oil or gas is or can be produced in "paying quantities." This is a clause for the benefit of the lessee; for it is obvious that a prudent man would not want to pay rent for premises after they had ceased to be productive; nor would he care to operate them, on even a royalty, where the operating expenses were more than the income. Occasionally the phrase might be of value to the lessor; for should the lessee occupy considerable surface of the ground leased, it might be of more value to him for other purposes than to have it continued for oil or gas purposes. If a lease is conditioned that it is to continue "so long as oil is produced in paying quantities," its duration depends upon the intention of the parties, as ascertained from the circumstances of the case.²¹ If the lease is for a specified period, as for "three years," or as

²⁰ *Island Coal Co. v. Combs*, 152 Ind. 379; 53 N. E. Rep. 452. In this case the lease was of coal lands, reserving a royalty on the output, requiring the lessee within a specified time to commence the work of development of the coal by opening shafts to remove it, and by opening mines so as to enable the coal to be mined and removed to market. It was held that this required actual mining operations to be commenced within the time named, and that the mere erection and equipment of shafts and mines by which coal might be mined was not sufficient. See *Duffield v. Russell*, 19 Ohio Cir. Ct. Rep. 266; 10 Ohio C. D. 472.

Neglect for forty years to develop premises on which a mining lease was given for ninety-nine years was held to be an abandonment. *Shenandoah Land, etc., Co. v. Hise*, 92 Va. 238; 28 S. E. Rep. 303.

^{20a} *Henderson v. Ferrell*, 183 Pa. 547; 38 Atl. 1018. In this case the lessee drove a stake and began unloading lumber on the land on the last day, with *bona fide* intention of staking a well; and this was held to prevent a forfeiture.

(a) Forfeiture, §§ 811, 905.

²¹ *Herrington v. Wood*, 6 Ohio Cir. Ct. Rep. 326; 3 Ohio Cir. Dec. 475; *Indiana Nat. Gas & Oil Co. v. Granger*, 33 Ind. App. 559; 70 N. E. Rep. 395; *Chaney v. Ohio & I. Oil Co.*, 32 Ind. App. 193; 69 N. E. Rep. 477. In paying quantity "means paying quantity to the lessee," even a small profit is a "paying quantity." *Lowther Oil Co. v. Miller, etc., Co.*, 53 W. Va. 501, 41 S. E. Rep. 433; 97 Am. St. 1027; citing *Young v. Oil Co.*, 194 P. St. 243; 45 Atl. Rep. 121. § 857, note 7; § 892, note 8; § 896, note 19.

much longer thereafter as oil or gas might be found in "paying quantities," then it extends only for three years, unless oil or gas be found in paying quantities before the expiration of the period named, or, in the illustration given, before the expiration of the three years.²² The use of the word "and" for "or" does not change the rule.²³ The interpretation of this clause has not by any means been uniform. Thus in New York a lease for a term of "twelve years from this date, or so long as oil is found in paying quantities," was held to be a lease for the length of time during which oil is found in paying quantities, and that fixed the duration of the term.²⁴ The reasonable interpretation of such a clause is that the lessee has that period of time fixed in the lease within which to develop the premises, and he is not bound to proceed to develop them as soon as the lease is granted, especially if he is to pay a fixed rent per acre or per year or otherwise, nor within what might be termed a

Such a lease is not void for uncertainty. *Dickey v. Coffeyville, etc., Tile Co.*, 69 Kan. 106; 76 Pac. Rep. 398; *Tucker v. Watts*, 25 Ohio Cir. Ct. Rep. 320; *Keller v. Bock*, 28 Ohio Cir. Ct. Rep. 119.

If the lease provides for the production of a great quantity of oil than merely enough to be a paying quantity, yet stockholders of the lessee cannot enjoin its cancellation. *McLean v. Kishi* (Tex. Civ. App.), 173 S. W. 502.

²² *Shellar v. Shivers*, 171 Pa. St. 569; 33 Atl. Rep. 95; *Cole v. Taylor*, 8 Pa. Super. Ct. Rep. 19; *Florance Oil, etc., Co. v. Orman*, 19 Colo. App. 79; 73 Pac. Rep. 628 (no well put down within the three years' limit—abandoned); *Indiana Natural Gas & Oil Co. v. Granger*, 33 Ind. App. 559; 70 N. E. Rep. 395; *Murdock-West Co. v. Logan*, 69 Ohio St. 514; 69 N. E. Rep. 984.

If gas in paying quantities be discovered during the period fixed in the lease for the development of the land, the effect will be that the term of the lease is extended so long as gas in paying quantities can be secured, although it may go beyond

the number of years fixed for the term. *American Window Glass Co. v. Indiana Nat. Gas & Oil Co.*, 37 Ind. App. 439; 76 N. E. Rep. 1006.

²³ *Northwestern Oil, etc., Gas Co. v. City of Tiffin*, 59 Ohio St. 420; 54 N. E. Rep. 77; *Cassell v. Crothers*, 193 Pa. St. 359; 44 Atl. Rep. 446; *Brown v. Fowler*, 65 Ohio St. 507; 63 N. E. Rep. 76; *Balfour v. Russell*, 167 Pa. St. 287; 36 W. N. C. 225; 31 Atl. Rep. 570; *Blair v. Northwestern, etc., Co.*, 12 Ohio Cir. Ct. Rep. 78; 5 Ohio Cir. Dec. 620; *American Window Glass Co. v. Indiana Natural Gas & Oil Co.*, 37 Ind. App. 439; 76 N. E. Rep. 1006.

²⁴ *Eaton v. Allegheny Gas Co.*, 122 N. Y. 416; 25 N. E. Rep. 981, reversing 42 Hun 61. See *Monfort v. Lanyon Zinc Co.*, 67 Kan. 310; 72 Pac. Rep. 784.

A lease which provides that it is to continue while gas and oil are found in paying quantities, ends when the time within which the lessee has the right to explore the land has expired, and no gas or oil has been found. *Cooke v. Gulf Refining Co.*, 127 La. 592; 53 So. 874.

reasonable time, so that he develops them before the period be determined.²⁶ But if he should fully develop them before the end of the fixed period, however long before, and clearly demonstrated that there is no oil or gas beneath the surface, then as soon as that fact is ascertained the lease is at an end. If a lessor has given a long period of time within which to develop the leased premises, that is his act and he cannot appeal to the courts to relieve him from the condition in which his own error has placed him. If the lease be for a certain period "and as long thereafter as oil is found in paying quantities," and the lessee fail after the fixed period to produce oil in paying quantities, the tenancy becomes one at will, not from year to year, and may be ended at any time by either party; and if oil, after the termination of the lease, be found in paying quantities, the lessee can not insist that his lease is still in force, nor claim any **part of the oil.**²⁷ A lease for two years "and as much longer as oil or gas would be found in paying quantities," requiring the lessee to commence a well within thirty and complete it within ninety days, and if no well was completed within the latter period, requiring the lessee to pay sixty dollars per year, the lessor to receive a certain part of the product as royalty, is terminated at the end of the two years, if oil or gas be not found in such quantities, and its life cannot be prolonged by the payment of the sixty dollars a year thereafter; for the life of the lease beyond the two years is dependent on the fact that oil or gas be found in paying quantities.²⁸ If the lease be for both gas and oil purposes and gas only is found the lessee is to pay a certain annual sum for each well, and if oil, pay a royalty; the production in paying quantities of either gas or oil, and the payment of gas rental, or the delivery of the oil royalty will

²⁶ See *Blair v. Northwestern, etc.*, Co., 12 Ohio Cir. Ct. Rep. 78; 5 Ohio Cir. Dec. 620.

²⁷ *Cassell v. Crothers*, 193 Pa. St. 359; 44 Atl. Rep. 446; *Williams v. Ladew*, 171 Pa. St. 369; 33 Atl. Rep. 329; *Ohio Oil Co. v. Delaware*, 165 Ind. 243; 73 N. E. Rep. 906; *Zeigler v. Dailey*, 37 Ind. App. 240;

76 N. E. Rep. 819; *Brewster v. Lanyon Zinc Co.*, 140 Fed. 801.

²⁸ *Western Pennsylvania Gas Co. v. George*, 161 Pa. St. 47; 28 Atl. Rep. 1004; *American Window Glass Co. v. Indiana Natural Gas & Oil Co.*, 37 Ind. App. 439; 76 N. E. Rep. 1006; *Indiana Natural Gas Co. v. Grainger*, 33 Ind. App. 559; 70 N. E. Rep. 395.

prolong the lease during the time of such production.²⁹ Where a lease required the lessee, if oil be found in paying quantities, to pay the lessor, in addition to land money six hundred dollars within thirty days, the court considered it capable of enforcement. "The obvious intention was," said the court, "that if, for the period of thirty days after its completion, the well continued to produce oil in such quantities as to make it profitable to operate it during that period, the six hundred dollars should be demandable." The court continued its observations upon the phrase "paying quantities," by saying: "There is a great difference between a paying well, i. e., a well producing oil in paying quantities, and one that pays for itself. A mine for years may produce ore in paying quantities and be very profitable during that time, and yet, through a later depreciation in the value of the mineral extracted from the ore, or from accident or failure to yield enough ore, it may never repay its first cost."³⁰ It is for the operator, acting in good faith, to determine when the lease is no longer profitable; and the lessor cannot terminate it because it is not profitable to him to have it continue.³¹ It is for the lessee, or some one for him acting under the lease, to find oil in paying quantities on the premises; and if another find it in such quantities, not acting under the

²⁹ *Harness v. Eastern Oil Co.*, 49 W. Va. 232; 38 S. E. Rep. 662; *Murdock-West Co. v. Logan*, 69 Ohio St. 514; 69 N. E. Rep. 984.

One of the conditions of an oil and gas lease was that the lessee should complete three wells within one year, if each well was a paying gas well, and complete a well every sixty days until ten wells were drilled, if each well drilled was a paying well. It was held that this contemplated the development of the territory for oil as well as gas, and the abandonment of the development for oil would thwart the manifest purpose of the lease and work an abandonment. *Beatty-Nickle Oil Co. v. Smethers*, 49 Ind. App. 602; 96 N. E. 19; *Paraffine Oil Co. v. Cruce* (Okla.), 162 Pac. 716.

³⁰ *Collins v. Mechling*, 1 Pa. Super. Ct. Rep. 594; 38 W. N. C. 235; 26 Pittsb. L. J. (N. S.) 459.

³¹ *Young v. Forest Oil Co.*, 194 Pa. St. 243; 30 Pittsb. L. J. (N. S.) 221; 45 Atl. Rep. 121, reversing *Young v. Vandergrift*, 30 Pittsb. L. J. (N. S.) 39; *Lowther Oil Co. v. Miller-Sibley Co.*, 53 W. Va. 501; 44 S. E. 433; 47 Am. St. 1027; *Manhattan Oil Co. v. Carrell*, 164 Ind. 526; 73 N. E. 1084; *Bay State Petroleum Co. v. Penn. Lubricating Co.*, 121 Ky. 637; 87 S. W. Rep. 1102; 27 Ky. L. Rep. 1133; *Brown v. Fowler*, 65 Ohio St. 507; 63 N. E. 76; *Cassell v. Crothers*, 193 Pa. 359; 44 Atl. 446; *McGraw Oil & Gas Co. v. Kennedy*, 65 W. Va. 595; 64 S. E. Rep. 1027; *Keller v. Book*, 28 Ohio Cir. Ct. Rep. 119.

A lease for five years, or so long as oil or gas shall be found in paying quantities, will not be vacated by a court of equity on the ground that the territory is so light as not

lease, that will not prevent a termination of the lease.³² Where the lessor reserved the right to select four acres out of a seventy-acre tract leased, and after the selection of the four acres the lessee drilled a well on the remaining part, but did not find oil; and, with the assent of the lessor, a well was drilled by the assignee of the lessee on the four-acre tract, which produced oil in paying quantities, it was held that the assignee was entitled to a continuance of the lease, for the reason that the leased property was producing oil in paying quantities.³³ A mere cessation of the use of gas from a well will not terminate the lease nor relieve the lessee from a liability to pay a rental so long as gas is produced in paying quantities, but the lessee must notify the lessor that the well has ceased to produce gas in such quantities, and for that reason he terminates and surrenders the lease.³⁴ Where a lease provided that if gas be "found in sufficient quantities to justify marketing" it an annual rent of five hundred dollars per annum for each well should be paid "so long as it shall be sold therefrom," and gas being obtained in such quantities to justify its marketing, it was held that the relation of landlord and tenant was established, and no good reason being shown why he should not, the lessee must market the gas and pay the rent.³⁵

§ 149. Paying quantities, continued.

Where the lessee was to commence a test well within ninety days from the date of the lease, and prosecute the drilling

to warrant the sinking of more wells. *Zeller v. Book*, 28 Ohio Cir. Ct. Rep. 119.

A stipulation in a lease that, if wells are put in and the lessee becomes satisfied that they do not pay, he may surrender the lease and remove the property, means that if the lessee becomes satisfied that a particular well is not paying, and such fact exists, the lease is terminated.

And such a stipulation in a gas lease that if wells are put in operation, and at any time the lessee is satisfied that it is not paying, he shall surrender the lease and remove the machinery, does not make the lessee a tenant at will, and the lease

is not terminable at his option, after the production of gas, on his assertion that a well is unprofitable, when the contrary is true. *Dickey v. Coffeyville Vitriified Brick & Tile Co.*, 69 Kan. 106; 76 P. 398.

³² *Thomas v. Hukill*, 34 W. Va. 385; 12 S. E. Rep. 522. See *Gorman v. Potts*, 135 Pa. St. 506; 26 W. N. C. 305; 19 Atl. Rep. 1071.

³³ *Balfour v. Russell*, 167 Pa. St. 287; 36 W. N. C. 225; 31 Atl. Rep. 570.

³⁴ *Double v. Union Heat, etc., Co.*, 172 Pa. St. 388; 37 W. N. C. 389; 33 Atl. Rep. 694.

³⁵ *Iams v. Carnegie Natural Gas Co.*, 194 Pa. St. 72; 45 Atl. Rep. 54.

"with due diligence to success or abandonment, and should oil be pumped or excavated in paying quantities on or before" the end of one year from the date of the lease, then the lease "to be null and void," and the lessee began the prosecution of the work on time and prosecuted it until the middle of the year when he withdrew the casing and left the premises for over three months; and the lessee claimed he had found oil in paying quantities, but admitted he had never pumped any from the well, it was held that the prosecution to success required the production of oil or gas in quantities capable of division between the parties, according to the terms of the lease.³⁶ A lease to run for a term of years, "or so long as oil or gas is found on the premises," providing for the payment of a certain rental "each year in advance for every well from which gas is used off the premises," renders the lessee liable only so long as he uses the gas; and upon the failure of the well, or if it becomes impracticable to use the gas therefrom, he is released from all liability.³⁷ Where the term was for years, and as much longer as gas or oil should be found in paying quantities; and one well was drilled which produced gas in paying quantities, and then failed; it was held, upon failure of the well, that the lessee was entitled to a reasonable length of time to drill at another location on the premises, for the purpose of finding oil or gas. "Does the language mean," asked the court, "that it is only so long as gas or oil is found in paying quantities in the first well drilled, and that, when it fails, the lease expires as to the entire premises? The whole premises was held by this lease for five years, and as much longer as gas or oil is found in paying quantities; not found in paying quantities

³⁶ *Kennedy v. Crawford*, 138 Pa. St. 561; 27 W. N. C. 306; 21 Atl. Rep. 191.

An offer to prove that the phrase "paying quantities" has a known significance in oil regions must be accompanied by an offer to show that such significance existed when the lease was executed in the neighborhood in which the leased premises were situated, or that the usage

was known to the lessor and lessee at that time. *Collins v. Meehling*, 1 Super. Ct. (Pa.) 594; 38 W. N. C. 235; 26 Pittsb. L. J. (N. S.) 459.

³⁷ *Indianapolis Gas Co. v. Teters*, 15 Ind. App. 475; 44 N. E. Rep. 549. See *Monfort v. Lanyon Zine Co.*, 67 Kan. 310; 72 Pac. Rep. 784. § 892, note 9; § 857, note 8; § 896, note 19.

in one well, but found in such quantities when proper and reasonable search is made for it.”³⁸ Where on the first of September an annual rental from the date of drilling a gas well was payable, and the well was drilled November 1, 1893, and the rent for the two succeeding years was paid, but on September 1, 1896, the well was abandoned as unprofitable, it was held that the lessor was entitled to recover a ratable part of the annual rental for the year in which the well was abandoned, but could not recover rent for the time after such abandonment.³⁹ If a rental is to be paid for a gas well and a royalty for the oil produced, the lessee is not liable for rental for a gas well which produces a little gas, although the gas from it is used for running the boilers on the premises.⁴⁰ An agreement to prospect, and if oil be found in a certain amount the royalty to be not less than a designated amount of money, and that a failure to surrender the lease by a certain day shall be an agreement that there is sufficient oil to pay the royalty named, will not render a failure to surrender conclusive of the amount of the oil found, but it will cast upon the lessee the burden to show that the amount found was less than the amount specified in the lease.⁴¹ A lease for three years, or so long as oil or gas should be found in paying quantities, provided that the lessor was to receive a share of the oil produced; and if gas was found producing one hundred pounds pressure to the square inch in thirty seconds, the lessee had the right to consume enough, free of cost, to light and heat his dwelling; but if it exceeded two hundred pounds, he was to pay a certain rental per well; it was held that he was not bound to pay any rental, or compensation or damage for occupation or use of the premises before or after the expiration of the three years, where, during such three years, he had drilled only one well which produced a pressure of less than two hundred pounds, but which had furnished gas for lighting and

³⁸ *Blair v. Northwestern Ohio, etc., Co.*, 12 Ohio Cir. Ct. Rep. 78; 5 Ohio C. D. 619; *American Window Glass Co. v. Indiana Natural Gas & Oil Co.*, 37 Ind. App. 439; 76 N. E. Rep. 1006.

³⁹ *Moon v. Pittsburg Plate Glass*

Co., 24 Ind. App. 34; 56 N. E. Rep. 108.

⁴⁰ *Taylor v. Peerless, etc., Co.*, 7 Ohio Cir. Dec. 368; 14 Ohio Cir. Ct. Rep. 315.

⁴¹ *McCahan v. Wharton*, 121 Pa. St. 424; 15 Atl. Rep. 615.

heating his residence.⁴² A lease containing a provision that the premises shall be worked so long as it can be "advantageously" done means so long as it can be "beneficially" or "profitably" done.⁴³ Where the condition was that the lessee should complete an oil well in every period of ninety days from the completion of the first paying well, or surrender the lease, excepting ten acres for each paying well, the lessee's obligation was held to continue to drill wells on the land and was also fixed when the first well proved to be a paying one.^{43a} But when a producing well is developed, and its product is not marketed, that fact does not authorize the lessor to forfeit the lease, if the lessee is willing to pay the sum agreed upon.^{43b} A provision in an oil lease that after the completion of the first well the lessee should drill a specified number of wells, in case oil should be found in paying quantities, does not mean that, if oil was found in the test or first well in a sufficient quantity to pay a profit, however small, in excess of the cost of producing it, excluding the cost of drilling the well and of equipment, then oil was found in paying quantities, within the meaning of the contract, but means that additional wells are to be drilled only in case oil be found in such quantities as would, taken in connection with other conditions, induce ordinarily prudent persons in a like business to expect a reasonable profit on the whole sum required to be expended; and whether oil was found in paying quantities is to be exclusively determined by the operator, acting in good faith.^{43c} A lease to continue while oil *and* gas are found

⁴² Oak Harbor Gas Co. v. Murphy, 7 Ohio Dec. 700.

⁴³ Garman v. Potts, 135 Pa. St. 506; 26 W. N. C. 305; 19 Atl. Rep. 1071.

Where a gas and oil lease provides that the lessee shall hold the premises for one year, and so long thereafter as oil and gas shall be produced in paying quantities, the lease expires at the expiration of one year, unless gas has been found in paying quantities. Chaney v. Ohio & I. Oil Co., 69 N. E. 477; 32 Ind. App. 193.

See also Eaton v. Allegheny Gas Co., 122 N. Y. 416; 25 N. E. 981; Shellar v. Shivers, 171 Pa. 569; 33 A. 95.

^{43a} Monaghan v. Mount, 36 Ind. App. 188; 74 N. E. Rep. 579.

^{43b} McGraw Oil & Gas Co., 65 W. Va. 595; 64 S. E. Rep. 1027; 28 L. R. A. (N. S.) 959.

^{43c} Manhattan Oil Co. v. Carrell, 164 Ind. 526; 73 N. E. Rep. 1084.

In one case five wells were sunk and oil discovered; but the lessee claimed that oil was too low in price to market it. The wells were

in paying quantities terminates when the right to explore the land has expired, and no oil *or* gas has been found.^{43e} Upon discovery of oil and gas in paying quantities, the lessee acquires a vested interest in the oil and gas granted by the lease as long as it can be produced in paying quantities.^{43f} A lease provided that it should run twenty years from the discovery of certain minerals, and as much longer as minerals should be produced in paying quantities. It was held that it terminated when the grantee ceased to operate.^{43g}

§ 150. Non-paying quantities.

If a lease is to continue so long as oil or gas is produced, then it is immaterial whether the lease is a paying one or not; for so long as the wells drilled produce either oil or gas the lease continues. The lessor cannot complain of his own folly in granting such a lease.^{43h} This is especially so if the lessee made and is making a faithful effort to make the wells sunk productive.⁴³ⁱ

§ 151. Gas in paying quantities.

A somewhat different rule from that followed in oil wells must be adopted when the phrase paying quantities is applied to a gas well, or perhaps, to speak more accurately, the phrase "paying quantities" as applied to a gas well requires different

closed for five years, when the court cancelled the lease because of abandonment. *Collins v. Mt. Pleasant Oil & Gas Co.*, 85 Kan. 483; 118 Pac. 54.

^{43c}*Cooke v. Gulf Refining Co.*, 135 La. 609; 65 So. 758.

^{43f}*Burgan v. South Penn. Oil Co.*, 243 Penn. 128; 89 Atl. 823.

^{43g}*Brown v. Producers Oil Co.*, 134 La. 672; 64 So. 674.

^{43h}*Gillespie v. Ohio Oil Co.*, 260 Ill. 169; 102 N. E. 1043.

⁴³ⁱ*South Penn. Oil Co. v. Snodgrass*, 71 W. Va. 438; 76 S. E. 961; 43 L. R. A. (N. S.) 848. See also *Shannon v. Long*, 180 Ala. 128, 60 So. 273.

The words "Gas Well" as used in an oil and gas lease was held to mean a gas well which could be profitably operated as such. *Pritchard v. Freeland Oil Co.*, 75 W. Va. 450; 84 S. E. 945; L. R. A., 1915, D1186.

conditions to render the lessee liable than it does to render him liable when applied to an oil well. In the early operation of oil wells the oil flowed from the well; but as the supply lessened, or the pressure of gas beneath it decreased, pumping was introduced. It was found that oil wells could be pumped at little expense, and their operation remain profitable. Many wells, hundreds of feet apart, could be operated with a single power plant of no great power. But in the case of gas it was different. The pressure at the mouth of the well was the force first used to carry the gas through the pipes to the consumer, who was often many miles away. Gradually pumps were introduced, when the pressure of the gas declined, or it was desired to carry it to a longer distance than the ordinary pressure would carry it. A gas pump is a costly instrument; and to operate it requires experts and costly machinery and a large amount of capital. Even today it may be said to be an unusual thing to pump gas; while it is a universal thing to pump oil. These phases of the subject have been ably discussed by the Supreme Court of Pennsylvania, in the following language:

“A lease of a mine or a quarry, at a rental to be fixed by reference to the quantity of material removed therefrom, implies an agreement on the part of the lessee to work the mine or quarry. The reason is that, while the lessor does not lose his material out of the mine or quarry, he loses his income therefrom. A lease of land for oil purposes imposes a somewhat different obligation upon the lessee. The oil is of such a nature that, if not removed through wells upon the surface of the leasehold, it may be wholly lost to the owner of the land by reason of operations on lands adjoining. The duty to develop the land, that is, to test thoroughly the existence of oil in the rocks that should bear it, and if oil be found, to sink so many wells as may be reasonably necessary in view of surrounding operations to secure so much of the oil underlying the land as may be obtained with profit, grows out of the nature of oil, and the

methods by which the oil is reached and brought to the surface. An oil lease must be construed, therefore, with a due regard to the known characteristics of the business. Oil and gas leases are ordinarily combined in the same instrument, and are classed together. For many purposes such classification is natural and appropriate, but this case brings us to consider an important difference between oil and gas, which makes it necessary to distinguish for some purposes between an oil and a gas lease. Oil, when brought to the surface, is gathered into a receiving tank or tanks at or near the well. When necessary or desirable, it is removed by gravity or by pumping into the pipe lines that serve the district in which the well is located, and conveyed to storage tanks, where it remains until delivered to a purchaser. It is a matter of no consequence what the pressure may be at the well, for there can be none in the tanks except that of gravity. The well that throws off violently its five thousand barrels per day and that which reluctantly gives up four or five barrels under the persuasive power of the pump will have their product gathered into the same lines of transportation, or resting in the same storage tanks. Gas cannot be gathered, stored, or transported in this manner. If found in sufficient quantity, it is turned from well into the line, and the pressure at the mouth of the well is the motive power by which it is driven through the line to the consumers' line. If the pressure at a given well is much below that in the line with which it is connected, the gas from that well cannot enter the line, but will be driven back by the superior force it encounters at the point of connection. For this reason, a well producing gas in sufficient quantity to be profitably utilized if there was a market for it near at hand, may be entirely valueless if its product must find a market at a distance too great to justify its transportation by a line of its own. In an oil district, each well, no matter how large or how small its product may be, is separately operated, and a well may be profitably operated so long as its yield pays more than the cost of producing the oil. In a gas district this is impracticable. The product of many wells is gathered into one line so long as the pressure is sufficient. When the pressure in any one falls

below the standard necessary for purposes of transportation, that well must be turned off. Its product cannot be transported separately, and, unless, it can be used near by, it is valueless. These well known facts peculiar to the production of gas must be taken into account in the construction of leases for gas purposes." "As we have already seen, every barrel of oil brought to the surface may be utilized in the same manner. Whether the well that produces it is a strong one, yielding many barrels per day, or a weak one, yielding but few, is a matter that in no way affects the ability of the producer to market his oil, or the prices to be obtained for it. In gas territory, the lessee may sink many wells and find gas in them all, but he can only utilize such of them as have a volume and pressure sufficient to enable him to transport the gas through his line and deliver it to the purchaser. If no one of them has the requisite pressure, then no one of them can be utilized; the gas must be wasted, the cost of the wells will be lost, and the lessor entitled to no royalty. What is the proper way to develop and operate a gas lease is, therefore, a question beset with some difficulty. Its settlement requires some general knowledge of the business, and some knowledge of the local field. The lessee may have a good well, from which he can utilize the gas with profit. He may put down another on the same farm, and thereby so reduce the pressure in the first as wholly to destroy its value, without getting a sufficient pressure at the second to enable him to utilize that. The gas, if coming from one well, would be of great value. Divided in such manner that the volume and pressure at each is below the necessary standard, the whole is lost. Thus the application of the rule laid down by the court below, as the jury must have understood it, might result in this, that the effort of the lessee to discharge the implied obligation of his contract for the common benefit, should end in the total destruction of the leasehold, and a common misfortune. The mistake of the court below was in failing to take account of and to read into the contract between the parties, the peculiar nature and characteristics of the business of producing and transporting gas, which the parties themselves well understood, and which their contract shows were before their minds

when it was entered into."⁴⁴ So long, however, as the lessee sells gas from a well, by running it into pipes connected with it, it is conclusive evidence of the right of the lessor to recover rent.⁴⁵ A gas well that supplies five stoves, one grate, three jets, and two street lights produces gas in paying quantities, where, after the quantity is known, all parties thereto join in or assent to the laying of pipe for its use and the expendi-

⁴⁴ McKnight v. Manufacturers', etc., Co., 146 Pa. St. 185; 23 Atl. Rep. 164; 28 Am. St. Rep. 790; Indianapolis Gas Co. v. Teters, 15 Ind. App. 475; 44 N. E. Rep. 549. See Glasgow v. Chartiers Oil Co., 152 Pa. St. 148; 25 Atl. Rep. 232; Murdock-West Co. v. Logan, 69 Ohio St. 514; 69 N. E. Rep. 984. § 857, note 9; § 896, note 19.

Where the term of an oil and gas lease is for "one year, and as much longer as oil or gas is found in paying quantities or the hereinafter described rental is paid," such term is of uncertain duration, which, after the beginning of a paying production, will end only with the ceasing of that production, unless sooner terminated for some other reason. Consumers' Heating Co. v. American Land Co., 31 Pittsb. Leg. J. (N. S.) 24.

Where a lease was entered into between a landowner and an oil producer for the purpose of enabling the latter to follow his occupation on the premises and produce oil and gas therefrom, the oil producer had the right to explore for oil, and, when he discovered it, the contract would endure for such time as was necessary to accomplish the purpose of the contract, and hence the agreement was not invalid because no time was fixed in it. Tucker v. Watts, 25 Ohio Cir. Ct. R. 320.

⁴⁵ Hankey v. Kramp, 12 Ohio Cir. Ct. Rep. 95; 5 Ohio C. D. 439.

In an action for rentals under a gas lease providing that, if gas were found in sufficient quantities to market and to be piped to such market, plaintiff's compensation should be a

certain sum per well, allegations in the complaint that gas was found in sufficient quantities to be marketed and to be piped to market, and that there were good markets within ten miles, and others further away, where the gas could have been delivered and sold at a profit to defendant, set out facts which, if proved, with the other material averments of the complaint, would entitle plaintiff to recover, and hence were not averments of mere opinions. Indiana Natural Gas & Oil Co. v. Wilhelm, 44 Ind. 100; 86 N. E. 86.

Under an oil and gas lease for a term of twenty years a well was drilled, and produced gas which was utilized by the assignee of the lessees, who paid the lessor a stipulated royalty of \$500 per annum on the well for two successive years, and before the end of the second year the well, through no fault of the assignees and operators, was flooded with salt water and ceased to produce gas; the flooding not being due to any negligence of the assignees. A lessor brought suit against the assignee of the lessees to recover the third and fourth years' royalty on the well. It was held that there should be read into the lease the implied agreement or understanding that the well which was to be paid for at the rate of \$500 a year was to be and remain a gas well, and that when it ceased to produce gas it ceased to be a gas well. McConnell v. Lawrence Natural Gas Co., 30 Pittsb. Leg. J. (N. S.) 346.

ture of money for such materials and work.⁴⁶ An oil and gas lease provided that, if gas was not "found" in paying quantities, the lessor might terminate the lease and have the gas by paying the ordinary price for the casing and rig, and it was to extend six years, and as much longer as gas was found in paying quantities. The word "found" was construed as referring to a continuing condition, and not synonymous with the word "discover;" and hence gas having been discovered but the well ceasing to yield a marketable quantity, the lessor was entitled to the well on paying for the rig.^{46a} So where a contract permitted a person to explore certain oil land, and provided for a sale to him at a specified price if paid within ninety days after "success" on the land, it was held that the finding of oil in less than paying quantities, or the finding of a stratum of salt several hundred feet below the surface, was not a "success" in finding commercial substances within the contract.^{46b} So where a gas lease for two years contained a clause "and as much longer as oil and gas are found in paying quantities," it was held, as a matter of law, that the lessor had no right to declare a forfeiture of the lease at the end of the two years, because during that time no gas had been marketed, where the evidence showed that a well on the land produced one million cubic feet per day, worth, when conveyed to market, three to five cents per one thousand feet.^{46c} And where the lease for gas was "so long as it is used for the same," it was held that the lease was terminable on the parties ceasing to use the property as a gas well; and if the gas ceased to flow the use of the well was actually terminated, and the subsequent discovery of gas in the well in quantities sufficient for user did not revive the lease.^{46d}

§ 152. Gas used for manufacturing purposes.

Where a lease is to continue for a certain number of years and until "gas ceases to be used generally for manufacturing

⁴⁶ *Herrington v. Wood*, 6 Ohio Cir. Ct. Rep. 326; 3 Ohio Cir. Dec. 475.

^{46a} *Smith v. Hickman*, 14 Pa. Super. Ct. 46.

^{46b} *Anse LaButte Oil Co. v. Babb*, 122 La. 415; 47 So. Rep. 754; *Phillips v. Hamilton*, 17 Wyo. 26; 95 Pac. 846.

^{46c} *Gummerville v. Apollo Gas Co.*, 207 Pa. 334; 56 Atl. Rep. 876.

^{46d} *Shenk v. Stahl*, 35 Ind. App. 444; 74 N. E. Rep. 538.

Where a deed conveying oil and gas provided that the grantee should pay a consideration in ad-

dition to that stated in the deed, within ninety days after a well was drilled producing oil in paying quantities, it was held that there was no obligation to produce gas alone. *Ball v. Freeman* (W. Va.), 87 S. E. 91.

The words "Gas Well" as used in an oil and gas lease was held to mean a gas well which could be profitably operated as such. *Pritchard v. Freeland Oil Co.*, 75 W. Va. 450; 84 S. E. 945; *L. R. A.*, 1915, D1186.

purposes," or whenever the lessee fails to pay the stipulated rental price within a time specified, the gas continues so long as gas is generally used for manufacturing purposes, and it cannot be terminated by the mere fact of non-payment of the rent at the option of the lessee.⁴⁶

§ 153. Payment as a renewal of the term.

As a rule the payment of another year's rent at the end of a term will not have the effect to renew the lease for another term. Thus where a lease was "for a term of twelve years and so long thereafter as petroleum, gas or mineral substances can be procured in paying quantities, or the payments hereinafter provided for are made according to the terms and conditions attaching thereto," it was held that the word "or" before the words "the payments" must be construed "and," and that the payment of the rent for the thirteenth year did not renew the lease for another term of twelve years, even though the receipt given for the payment recited that the "payment continues said lease in force for another term." "In our opinion," said the court, "this transaction would not be sufficient to extend such lease for additional term of twelve years, but it is sufficient to constitute a waiver by the landowners of the definite time of termination therein fixed. It was therefore a waiver of this right to claim a forfeiture of the lease at the end of the twelve-year period, and effective to require notice to the lessee and a reasonable time thereafter to comply with the terms of the lease before forfeiture. There is no claim of fraud or bad faith anywhere in this deal, whereby the landowners were overreached or induced to grant such waiver. It must be presumed that they accepted the thirteenth payment with full knowledge of all the facts, as well as its legal effect. They were at liberty to insist upon a termination of the leases according to their terms or waive such stipulation. For a valuable consideration they chose the latter. By their own voluntary choosing they must be content. Therefore to give

⁴⁶*Diamond Plate Glass Co. v. Knote*, 38 Ind. App. 20; 79 N. E. Rep. 954; *Hancock v. Diamond Plate Glass Co.*, 162 Ind. 146; 70 N. E. Rep. 149, overruling *Diamond*

Plate Glass Co. v. Curless, 22 Ind. App. 246; 52 N. E. Rep. 782; *Diamond Plate Glass Co. v. Echelbarger*, 24 Ind. App. 124; 55 N. E. Rep. 233.

the transaction the force we have ascribed to it does not take away from the landowner the right to declare a forfeiture of such lease." ^{46f}

**§ 154. Non-paying well as a termination of the lease.—
Abandonment.—Drilling or completing a well.**

The question has arisen whether the development of a non-paying or non-producing well is a termination of the lease. The question may arise when the payment of rent is involved. Thus where a lease provided that "in case a well is not completed within six months from the date" of the lease, the "lessee will pay to the lessors for the delay the sum of ten dollars each quarter thereafter, in advance, until said well be completed or this lease surrendered." "If at any time after a well or wells have been drilled six months shall elapse without any revenue being received by the lessors from said well or wells, or without any further drilling being done by the lessee, this lease shall be deemed abandoned and all rights of the lessee thereunder ended." This lease was dated June 30, 1898. No well was completed within six months from that date; and within the expiration of that time the payment of the stipulated sum of ten dollars a quarter begun and was continued up to and including October 1, 1902. In July, 1902, an attempt was made to drill a well which proceeded until a depth of 1,000 feet was reached; and then the casing was pulled out and the hole plugged, and no further drilling done. There was evidence from which it might be inferred that the drilling showed the existence of oil in sufficient quantity to warrant shooting, which was not attempted; and it was held that the operations described amounted to the drilling of a well within the meaning of the contract, and that the cessation of the operations for six months constituted an abandonment of the lease; and that the receipt of a quarterly payment of the operations described took place, but less than six months thereafter, did not commit the lessor to the position that a well had not been drilled, for it was the completion of a well that was to end such payments, and the well had not been

^{46f} American Window Glass Co. v. Indiana Nat. Gas & Oil Co., 37 Ind. App. 439; 76 N. E. Rep. 1006; In-

diana Natural Gas & Oil Co. v. Beales, 166 Ind. 684; 76 N. E. Rep. 520, reversing 74 N. E. Rep. 551.

completed within the meaning of the lease. The court said there was a difference between completing a well and drilling a well; and that "those phrases cannot be said, as a matter of law, to mean the same thing."^{40g} In this case it was contended that, although the well showed the presence of some oil, yet the product of the drilling was not properly a well, but it was a mere "dry hole," and not a well within the meaning of the word as employed in the contract. The court referred to the practice of courts to refer to "dry wells" and "non-productive wells," and referred to a case where certain persons bought an "oil well" which did not yield oil in commercial quantities, and, as it did not respond to the designation used, there was a failure of consideration. But the court before whom the case was pending on appeal said: "The thing sold here was an oil well, and it is admitted the company got an oil well, but the objection is that it wholly failed to answer the purpose for which it was bought. It did not yield enough to justify working it. This fact, however, does not constitute a failure of consideration."^{40h} Referring again to the case under discussion in this section, I quote: "The well or hole involved in the present case was never shot, and there was testimony that the reason for this was that the indications were not such as to justify it. But there was also testimony that there was some oil in the well, and that other wells in the neighborhood that showed no more favorably at the same stage had produced oil in paying quantities after being shot. The pulling up of the casing was certainly strong evidence that those in charge of the work believed in good faith that the further prosecution was useless, still the trial court may have concluded that they were mistaken or perhaps insincere." The court, therefore, held that the lower court was justified in holding that the lease was abandoned after the well had been drilled.⁴⁰ⁱ

^{40g} Federal Betterment Co. v. Bales, 75 Kan. 69; 88 Pac. Rep. 555.

^{40h} Pennman v. Winner, 54 Md. 127. See also Smith v. Penn. Oil Co., 59 W. Va. 204; 53 S. E. Rep. 152.

⁴⁰ⁱ The court construed the provisions of the lease thus: "That

when a well has been drilled—that is, when enough boring has been done to show the presence of oil—the lessee has but three courses open: (1) To complete it and see that it produces revenue; or (2) so to prosecute operations that six months shall not elapse without some drilling; or (3) to surrender

§ 155. Abandonment.(a)

The distinction between an abandonment and a forfeiture is often so thin as not to be distinguishable. And yet, broadly speaking, there is a difference, which may in a measure be stated thus: An abandonment rests upon the intention of the lessee to relinquish the premises, and is therefore a question of fact for the jury;⁴⁷ while a forfeiture does not rest upon an intent to release the premises, but is an enforced release.^{47a} The act that authorizes the declaration by the lessor of a forfeiture may be unintentionally, or unavoidably, committed, by the lessee, with no design to relinquish his lease, and yet will work a forfeiture. It, however, matters little to the lessee or lessor, for in either instance he loses his lease and his term is ended. Whether or not a lease has been abandoned is a matter of defense, and need not be negatived by the plaintiff in an action for the rent.⁴⁸ If the lessee in fact abandon

all claims under the lease and suffer the lessor to resume the absolute control of his property."

To the argument that because of the acceptance of \$10 paid October 1, 1902, the lessors admitted that the hole bored during the preceding July was not a well, since quarterly payments were to cease wherever a well had been completed, the court said: "This argument ignores the distinction between completing a well and drilling a well. These phrases cannot be said, as a matter of law, to mean the same thing. There was evidence in this case from which it might be found that a well was drilled but not completed, if these words are to be given their ordinary meaning, and there is nothing in the contract itself or in the undisputed facts that require any unusual significance to be attached to them." *Federal Betterment Co. v. Blaes*, 75 Kan. 69; 88 Pac. Rep. 555; *Highfield Co. v. Kirk*, 248 Pa. 19; 93 Atl. 815.

A provision that when the lessee "shall begin such operation, it shall have the right to make such successive attempts to find oil as it may desire," does not mean that the time of the lease is for an uncertain time. *Cook v. Gulf Refining Co.*, 127 La. 592; 53 So. 874.

(a) Forfeiture, § 905.

⁴⁷ *Beatty v. Gregory*, 17 Ia. 109; *Bartley v. Phillips*, 165 Pa. St. 325; 30 Atl. Rep. 842; *Whitcomb v. Hoyt*, 30 Pa. St. 403; *Calhoun v. Neely*, 201 Pa. St. 97; 50 Atl. Rep. 967; *Lowther Oil Co. v. Miller-Sibley Oil Co.*, 53 W. Va. 501; 44 S. E. Rep. 433; *Garrett v. South Penn. Oil Co.*, 66 W. Va. 587; 66 S. E. Rep. 741; *Gray v. Spring*, 129 La. 345; 56 So. 305.

^{47a} *Garrett v. South Penn. Oil Co.*, 66 W. Va. 587; 66 S. E. 741; *Fisher v. Crescent Oil Co. (Tex. Civ. App.)*, 178 S. W. 905.

⁴⁸ *McDowell v. Hendrix*, 67 Ind. 513.

the lease for the purpose for which it was granted, it is not necessary for him to yield up actual possession of the surface, to enable the lessor to declare an abandonment has been made.⁴⁹ Rent falling due or accruing before abandonment must be paid.⁵⁰ The lessee cannot abandon a part of the premises and retain a part; to render his act of abandonment effectual he must abandon the whole premises and all his rights under the lease.⁵¹ If the lessor acquiesce in the temporary or other cessure of work for a period extending beyond the time when the work was to have been completed, he cannot because of each cessure, especially where the lessee has resumed operations at a considerable expense to himself, insist that there has been an abandonment.⁵² As against anyone but the grantor, an abandonment is not complete until the statutory period of limitation or the end of the term granted, and possession may be resumed by the grantee at any time previous.⁵³ A privilege to mine for gold that is a personal privilege, is terminated by the abandonment by the person to whom it was given.⁵⁴ If the lease be once abandoned, the lessee cannot resume operations under it, without the consent of the lessor.⁵⁵ A forfeiture clause is not necessary to enable the lessee to abandon the lease.^{55a} The fact that under a provision in leases the lessee issues to the lessors what are denominated "first mortgage bonds" for a certain amount per acre, with interest

⁴⁹ *Eaton v. Allegheny Gas Co.*, 122 N. Y. 416; 25 N. E. Rep. 981; reversing 42 Hun 61; *Gadbury v. Ohio, etc., Gas Co.*, 162 Ind. 9; 67 N. E. Rep. 249; *Conklin v. Krاندusky*, 127 App. Div. 761; 112 N. Y. Supp. 13 (two months' failure to pay rent).

⁵⁰ *Buhl v. Thompson*, 3 Penny (Pa.) 267. See *Smiley v. Western, etc., Co.*, 138 Pa. St. 576; 27 W. N. C. 230; 21 Atl. Rep. 1.

⁵¹ *Bestwick v. Ormsby Coal Co.*, 129 Pa. St. 592; 18 Atl. Rep. 538.

⁵² *Riddle v. Mellon*, 147 Pa. St. 30; 23 Atl. Rep. 241.

⁵³ *Bartley v. Phillips*, 165 Pa. St. 325; 30 Atl. Rep. 842; *Bartley v. Phillips*, 179 Pa. St. 175; 36 Atl.

Rep. 217. See *Eaton v. Allegheny Gas Co.*, 122 N. Y. 416; 25 N. E. Rep. 981; reversing 42 Hun 61.

⁵⁴ *Hodgson v. Perkins*, 84 Va. 706; 5 S. E. Rep. 710.

⁵⁵ *Cole v. Taylor*, 8 Pa. Super Ct. Rep. 19; *Shenk v. Stahl*, 35 Ind. App. 444; 74 N. E. Rep. 538; *Ohio Oil Co. v. Detamore*, 165 Ind. 243; 73 N. E. Rep. 906; *Florence Oil, etc., Co. v. Orman*, 19 Colo. App. 79; 73 Pac. Rep. 628 (two years' failure to develop); *Conklin v. Krاندusky*, 127 App. Div. 761; 112 N. Y. Supp. 13; *Rawlings v. Armel*, 70 Kan. 778; 79 Pac. Rep. 683.

^{55a} *Smith v. Root*, 66 W. Va. 635; 66 S. E. Rep. 1005; 30 L. R. A. (N. S.) 176.

payable from its net profits, reserving the right to cancel the same and abandon the leases, does not affect the right of the lessors to treat the leases as abandoned, although they have not returned the bonds, where they have received no payments thereon, such bonds not being negotiable nor of any validity after the leases are terminated by the act of either party.^{55b} Expenses of a grantee in drilling wells after abandonment and notice by the lessor not to drill them cannot be recovered from the grantor.⁵⁶ Whether or not there has been an abandonment is a question of fact for the jury.^{56a} But in some instances the court may say as a matter of law there has been an abandonment. Thus the owner of land in 1893 executed an oil lease thereof to G., for the term of fifteen years, or as long as oil should be found in paying quantities. G., in pursuance of the terms of the lease, drilled a well and finished it in 1894, but found no oil in paying quantities, and in the same year took away his machinery and rigging used in drilling, leaving only the casing in the well, and did nothing further in the matter until 1905, after the owner, in 1904, had executed another oil lease of the land to plaintiff, when G. put down another well on the premises. It was held that the evidence showed as a matter of law that G. had abandoned his lease before the execution of the lease to plaintiff.^{56b} Whatever interest the lessee had under the lease, even a "freehold interest," becomes extinguished when the work is abandoned.^{56c} It is not necessary that the statute of limitations shall have fully run in order to be an abandonment.^{56d} In view of the

^{55b} Logan Natural Gas Co. v. Great Southern Gas Co., 126 Fed. Rep. 623.

⁵⁶ Detlor v. Holland, 57 Ohio St. 492; 49 N. E. Rep. 690; 39 Wkly. L. Bull. 187; 40 L. R. A. 266.

^{56a} Rawlings v. Armel, 70 Kan. 778; 79 Pac. Rep. 683; Aye v. Philadelphia Co., 193 Pa. 451; 44 Atl. 555; Garrett v. South Penn. Co., 66 W. Va. 587; 66 S. E. Rep. 741; Smith v. Root, 66 W. Va. 633; 66

S. E. Rep. 1005; 30 L. R. A. (N. S.) 176.

^{56b} Conklin v. Krandsky (N. Y.), 112 N. Y. Supp. 13; Tucker v. Watts, 25 Ohio Cir. Ct. Rep. 320; Mills v. Hartz, 77 Kan. 218; 94 Pac. Rep. 142.

^{56c} Watford Oil & Gas Co. v. Shipman, 233 Ill. 9; 84 N. E. Rep. 53; 122 Am. St. 144.

^{56d} Rawlings v. Armel, 70 Kan. 778; 79 Pac. 683. The law recog-

nature of the subject matter, abandonment will be more readily found in case of oil and gas leases than in most cases. If the lease be abandoned the lessee cannot thereafter revive it, without the consent of the lessor. A releasing of the premises by the lessor shows an intention to treat the first lease as annulled.^{56e} The question of an intent to abandon is one of fact, and there must be evidence to sustain such a finding.^{56f}

§ 156. Lessee may abandon non-productive premises.(a)

As the object in leasing oil or gas premises is to secure the oil or gas beneath the surface, as soon as it has been demonstrated that no oil, in case of an oil lease, or no gas, in case of a gas lease, is beneath the surface, or it does not exist in paying quantities, the lessee may abandon the premises or his lease; or if the oil or gas becomes exhausted he may in like

nizes a distinction between the abandonment of operations under a lease and an intention to abandon or surrender the lease itself. *Parish Fork Oil Co. v. Bridgewater Gas Co.*, 51 W. Va. 583; 42 S. E. 655.

^{56e}*Harris v. Riggs* (Ind. App.), 112 N. E. 36.

A provision of an oil lease that "it is expressly understood that the lessee reserves the right to abandon said premises, and to remove all property placed thereon by it, at discretion," held to be potestative condition. *Caddo Oil Mining Co. v. Producers' Oil Co.*, 134 La. 701; 64 So. 684.

^{56f}*Fisher v. Crescent Oil Co.* (Tex. Civ. App.), 178 S. W. 905.

An oil and gas lease binding the lessee to drill within a certain period or make periodical payments of rent, containing no clause of

forfeiture, can be terminated only by surrender, abandonment, or expiration of the term. *Reserve Gas Co. v. Carbon Black Mfg. Co.*, 72 W. Va. 757; 79 S. E. 1102.

A failure for ten years, on the part of a lessee holding a vested right to produce oil from land, to enter on the premises and undertake a fulfillment of the implied covenants of the lease which obligate him to operate the property, during all of which time an adjoining well is producing oil, and presumably draining the neglected premises, sufficiently evinces an intention of the lessee to abandon his rights in the premises. His laches are so great, equity will not aid him. *Harris v. Michael*, 70 W. Va. 356; 73 N. E. 934.

(a) § 855.

manner abandon them. This is true of other minerals. Thus where a lease required the lessee to mine at least a certain quantity of iron ore each year and pay a royalty thereon, or even if not mined pay the royalty, it was held that if the ore become exhausted during the term the lessor was not thereafter entitled to royalties.⁵⁷ And the same is true if the mineral is not merchantable; for it cannot be understood that the parties contemplated the mining of unmarketable ore.⁵⁸ Where a lessee covenanted to pay so much for each ton of coal mined, and for any period of three years after the first the aggregate royalty should not be less than ten thousand dollars, whether ore to that extent was mined or not, it was held that the lessee could show as a defense, when an action was brought to recover the royalty due for the second period of three years, that the ore contained in the leased premises was not sufficient in quantity to produce the amount of rent or royalty claimed by the lessor, and that too even though judgment for the rent due on the first period of three years had been recovered.⁵⁹ But an absolute agreement to pay for so much coal, whether there is coal or not, will defeat a defense that there was no coal on the leased premises.⁶⁰

§ 157. No express forfeiture clause necessary for an abandonment.

In speaking about the power to abandon an oil lease, the Supreme Court of West Virginia used this language: "It is

⁵⁷ *Hewitt Iron Mining Co. v. Desau Co.*, 129 Mich. 590; 89 N. W. Rep. 365. This is true of oil and gas leases. *Watford Oil & Gas Co. v. Shipman*, 233 Ill. 9; 84 N. E. Rep. 53; 122 Am. St. 144; *Rawlings v. Armel*, 70 Kan. 778; 79 Pac. Rep. 683.

The first well proving to be a dry one is not sufficient to show an abandonment or cessure of the lease. *Logansport, etc., Gas Co. v. Ross*, 32 Ind. App. 638; 70 N. E. Rep. 544. See *Ohio Oil Co. v. Detamore*, 165 Ind. 243; 73 N. E. Rep. 906.

⁵⁸ *Muhlenberg v. Henning*, 116 Pa. St. 138; 9 Atl. Rep. 144. See *Johnston v. Cowan*, 59 Pa. St. 275; *Grib-*

ben v. Atkinson, 64 Mich. 651; 31 N. W. Rep. 570; *Cook v. Andrews*, 36 Ohio St. 174; *Brick, etc., Co. v. Pond*, 38 Ohio St. 65; *Read v. Beck*, 66 Iowa 21; 23 N. W. Rep. 159. *Contra*, *Clark v. Midland, etc., Co.*, 21 Mo. App. 58; *Indianapolis, etc., Co. v. Teeters*, 15 Ind. App. 475; 44 N. E. Rep. 549.

⁵⁹ *Kemble Coal and Iron Co. v. Scott*, 90 Pa. St. 332; *Boyer v. Fulmer*, 176 Pa. St. 282; 35 Atl. Rep. 235. See *McCalan v. Wharton*, 121 Pa. St. 424; 15 Atl. Rep. 615.

⁶⁰ *Timlin v. Brown*, 158 Pa. St. 606; 28 Atl. Rep. 236.

true, as counsel contends, that there is no express forfeiture clause in the contract, but this does not prevent the lessees from voluntarily abandoning the lease. The contract expressly gave them the right to surrender the lease at any time, upon the payment to the lessor of one dollar. This provision in the contract was evidently intended for the benefit of the lessee and to avoid the payment of any further cash rental. This is one method by which the lessee could certainly have been ended, but it did not preclude the possibility of terminating the contract by some other method. If the lessees choose to abandon the enterprise, and thus put an end to the contract, without an actual return to the lessor of the lease contract and the payment to him of the one dollar, they could surely do so, but not without liability to him for the cash rental then due. On the other hand, the lessor could waive his right to collect the cash rental, and in the event of an actual abandonment by the lessees, could release the premises. This contract, commonly called an oil and gas lease, did not invest Goff and Meek with any estate in the oil and gas in place; it simply gave them the exclusive right to make exploration upon this land for oil and gas. The right was simply an inchoate right, not a vested estate in land. The lease is an executory contract in the nature of a license to enter upon the land and make exploration for oil and gas for a period of ten years, and longer if oil or gas be discovered, and to extract them from the earth. No estate vests until discovery. Consequently the rights of the respective parties under this lease are not to be determined solely by the rules of law applicable in determining whether or not an estate in lands, once vested, has been forfeited. Neither is it necessary that a lease, such as the one under consideration, should contain a forfeiture clause before it can be shown that the lessee actually relinquished all his rights thereunder; in other words, that he abandoned the lease. A lessee may abandon the premises notwithstanding there is no forfeiture clause. His failure to pay the cash rentals stipulated in the contract may not alone be sufficient to prove abandonment; but his failure to pay, taken in connection with other facts and circumstances evincing a clear intention to abandon the enterprise, coupled with the fact that no operations were ever begun upon the land, is sufficient to prove relinquishment of lessee's rights. If

abandonment by a lessee, who has taken possession and begun operations on the premises, can be established by proving a relinquishment of the leased premises, coupled with an intention to abandon, it certainly follows that an abandonment, or what is practically the same thing, a relinquishment of his rights, by a lessee who has never taken possession, or begun operations on the leased premises, may be established by proving that he had abandoned his intention to do so. There is an implied covenant in the lease under consideration that lessees will use diligence to develop the property. In view of this implied agreement to use diligence in making development, the failure to do so, or to pay the cash rentals for a long time, becomes a potent element of proof of intention to abandon."^{60a}

§ 158. Abandonment under mutual mistake of law concerning rights to hold leased premises.

In a case where it was argued for the lessees that they misconstrued the contract, that they were laboring under a misapprehension of their legal rights, and that this was a mistake of law by which they should not be bound. To this argument the court said: "But if such was their understanding of the agreement, and they acted upon it, how can they be heard to complain of their own mistake of law? If such was their interpretation of the writing, then it might well be said that such was in fact their agreement, so long as it did not militate against the rights of the lessor. The lessor and lessees both put the same construction on the contract; they both thought that a failure to pay cash quarterly rental, promptly in advance, terminated the contract; and if the lessees abandoned their rights in ignorance of what those rights actually were, they were not misled by the lessor to do so, and they have only themselves to blame. They were not vested with title to real estate by the contract; they simply had the right, by its terms, to hold the lease for a period of ten years, even without making any effort to develop. But they were also bound to pay at the rate of \$26.50 a quarter as a consideration for this right, and, thinking their rights would cease if payment was not promptly made, they applied to the lessor for a continuation of the lease

^{60a} Smith v. Root, 66 W. Va. 633; 66 S. E. Rep. 1005; 30 L. R. A. (N. S.) 176; See also Rawlings v. Armel, 70 Kan. 778; 79 Pac. 683; Reserve Gas Co. v. Carbon Black Mfg. Co., 72 W. Va. 757; 79 S. E. 1102.

through another quarter without pay of rental, and this was refused. This shows the understanding of the contracting parties. Neither was misled by the other. The lessees are now, in effect, asking to be relieved against the consequences of a mistake of law committed by themselves. It is a rule almost universally applied by the courts, that relief cannot be given in favor of one who has committed a mistake of law. Consequently, the reason, or motive, for the abandonment, if one actually occurred, becomes immaterial."^{60b}

§ 159. Completion of non-productive well.—Title.(a)

So thoroughly fixed in the law of oil or gas leases is the principle that if the leased premises prove non-productive no title to them vests in the lessee, that the completion of a non-productive well, even though at great expense, will not vest a title to such premises in the lessee.⁶¹

§ 160. Instances of abandonment.(b)

Ceasing to operate a coal mine, and removing the machinery and appliances, was held a sufficient abandonment, without a surrender of the lease, or cancellation of mortgages of the leasehold that were on record.⁶² Where a lease of a coal mine was given in 1858, a rental to be paid per annum on a minimum amount of coal; but the lessee, thinking the mines not worth working, never went on the lands, and in 1871 ceased paying rent, it was held that in 1879 the lessor had a right to consider the premises abandoned and to relet them.⁶³ Where a coal

^{60b} *Smith v. Root*, 66 W. Va. 633; 66 S. E. Rep. 1005; 30 L. R. A. (N. S.) 176.

(a) §§ 877, 913.

⁶¹ *Steelsmith v. Gartlan*, 45 W. Va. 27; 29 S. E. Rep. 978; 44 L. R. A. 107; *Barnhart v. Lockwood*, 152 Pa. St. 82; 31 W. N. C. 209; 25 Atl. Rep. 237; *Detlor v. Holland*, 57 Ohio St. 492; 49 N. E. Rep. 690; 40 L. R. A. 266; *Huggins v. Daley*, 99 Fed. Rep. 606; 48 L. R. A. 320; *Manhattan Oil Co. v. Carrell*, 164 Ind. 526; 73 N. E. 1084; *Logans-*

port, etc., Gas Co. v. Ross, 32 Ind. App. 638; 70 N. E. Rep. 544; *Ohio Oil Co. v. Detamore*, 165 Ind. 243; 73 N. E. Rep. 906.

What is a producing well, and the distinction between drilling a well and completing one, see *Federal Betterment Co. v. Baeles*, 75 Kan. 69; 88 Pac. Rep. 555.

(b) § 856.

⁶² *Van Meter v. Chicago, etc., Co.*, 88 Iowa 92; 55 N. W. Rep. 106.

⁶³ *Porter v. Noyes*, 47 Mich. 55; 10 N. W. Rep. 77.

lease requires the lessee, in case he abandoned the premises, to notify the lessor, it is immaterial whether or not he gives such notice, if he in fact abandon them; and finding quantities of coal that will not justify mining it will not change the rule.⁶⁴ Where a lease was executed in 1878, for oil and gas, but the lessees never entered upon the premises, because of the fact they had drilled a well near the leased premises which proved to be a dry well; and twelve years afterward the premises having become valuable by reason of other territory in the neighborhood proving to be good for oil, when the lessees claimed the leased premises, it was held that by their conduct they had not only abandoned but surrendered the premises.⁶⁵ A lease was given "for the sole and only purpose of mining and excavating for petroleum, or carbon oil, gas, or other valuable mineral or volatile substances," for twenty years, the consideration being one-eighth of the product. It provided that "the party of the second part covenants to commence operations for said mining purposes within six months . . . on some one of the farms leased . . . and when oil is found in paying quantities, then he agrees to commence operations within sixty days upon the next adjoining farm leased by him, and so on until all lands (hereby) leased in the township are tested to success or abandonment." The lessee began operations and drilled a well on another farm, but found neither oil nor gas. He made no further effort to test the land, for the reason that he thought the territory was worthless as oil land. Six years after the lessor gave a second oil lease on the territory to a third party. It was held that the last lease was valid, because the first one had been abandoned.⁶⁶ An oil lease provided that the lessees "shall have the right at any time to surrender up this lease, and be released from all money due and conditions unfulfilled." It gave the lessor no right to rescind. There was no express covenant on the part of the lessees to develop the land; but they agreed to bore a well or pay one hundred dollars a month if they

⁶⁴ East Jersey Co. v. Wright, 32 N. J. Eq. 248.

⁶⁵ Barnhart v. Lockwood, 152 Pa. St. 82; 25 Atl. Rep. 237.

⁶⁶ Venture Oil Co. v. Fretts, 152 Pa. St. 451; 25 Atl. Rep. 732; 31 W. N. C. 432.

did not. The lessees never took possession of the land. On the trial it was shown that after the first two payments had been made, two of the three lessees requested of the lessor for time on the third monthly payment; and it was agreed that the time should be extended three weeks, and if the rent by that time was not paid, they should surrender the lease. The money was not paid as agreed; and one of the lessees told the lessor that he could lease the property to any one, and that the lease would be returned. It was never redelivered. Sixteen months afterward the owner executed a second lease of the premises to a third party. It was held that there had been a rescission of the lease; and a tender of the monthly rental after the rescission could not revive the lessees' rights or privileges.⁶⁷ Of course after the lessee has abandoned the lease the lessor is no longer bound.⁶⁸ A lease on a royalty of so much per ton, on coal mined, of coal lands for ninety-nine years is abandoned where nothing is done by the lessee for seventeen years;⁶⁹ and so for eleven years.⁷⁰ Under a five-year lease, or as long as gas and oil may be found in paying quantities, and a conveyance to the lessee of a part of the land is made, in the deed of conveyance, it being provided that it shall not affect the rights of the grantee under the lease and that a certain payment shall be in full payment of all the lease rental and royalty thereunder until the time when other wells are drilled and the product taken from them — the lessee cannot begin operations on the land not conveyed after the expiration of five years.⁷¹ A lease was given for ten years, and as long thereafter as oil and gas were found in paying quantities. The lessee was required to drill a well within one year. He had the right to abandon the premises at any time, but the abandonment was not to deprive him of the right to convey oil and gas over the land from other lands, on an annual rental.

⁶⁷ *Hooks v. Forst*, 165 Pa. St. 238; 30 Atl. Rep. 846. § 856.

⁶⁸ *Cowan v. Radford Iron Co.*, 83 Va. 547; 3 S. E. Rep. 120.

⁶⁹ *Bluestone Coal Co. v. Bell*, 38 W. Va. 297; 18 S. E. Rep. 493. Oil lease abandoned by twenty years'

non-user. *Wagner v. Mallory*, 41 N. Y. App. Div. 126; 58 N. Y. Supp. 526.

⁷⁰ *Welty v. Wise*, 5 Ohio N. P. 50.

⁷¹ *Simon v. Northwestern Ohio, etc., Co.*, 12 Ohio Cir. Ct. Rep. 170; 5 Ohio C. D. 456.

He completed a well on time, which was unproductive. Two years after the lease was granted, he notified the lessor of his intention to abandon the well; drew the casing, and removed all his machinery. Subsequently he drilled wells and conducted operations at great cost in the vicinity, but made no search on the leased premises. Five years after he abandoned his search, the lessor requested him to surrender the lease, which he refused to do, and afterwards recorded it. In an action involving its validity, he testified that he had never intended to abandon the lease; but the court held that a finding of abandonment was justified by the evidence.⁷² A non-exclusive right to enter on lands for mining purposes only and to prospect thereon and mine them, does not prevent the grantor and his grantees from prospecting and mining on the same land; and no presumption of an abandonment of the first right granted arises from the fact that similar rights were exercised by the grantor and his grantee.⁷³ If a lease requires that the work of testing a well shall be prosecuted with due diligence, a cessure of operations for three months after work begun is an abandonment of it.⁷⁴

⁷² *Stage v. Boyer*, 183 Pa. St. 560; 38 Atl. Rep. 1035; *Heintz v. Shortt*, 149 Pa. St. 286; 24 Atl. Rep. 316; *Highfield Co. v. Kirk*, 248 Pa. 19; 93 Atl. 815 (16 years).

⁷³ *Woodside v. Ciceroni*, 93 Fed. Rep. 1; 35 C. C. A. 177.

⁷⁴ *Kennedy v. Crawford*, 138 Pa. St. 561; 21 Atl. Rep. 19; *Monroe v. Armstrong*, 96 Pa. St. 307; *Steel-smith v. Gartlan*, 45 W. Va. 27; 29 S. E. Rep. 978; 44 L. R. A. 107; *Huggins v. Daley*, 99 Fed. Rep. 606; 48 L. R. A. 320.

See also *Coffinberry v. Sun Oil Co.*, 68 Ohio 488; 67 N. E. Rep. 1069.

Where a lessee of a coal mine left his tools on the premises for two years, but did not work the mine, it was held he had not abandoned the mine, nor had he abandoned stone he had quarried and left on the ground. *Russell v. Stratton*, 201 Pa. St. 277; 50 Atl. Rep. 975.

Where the complaint alleged provisions of the lease showing that a well was to be drilled within three months, or thereafter the lessee was to pay the lessor a specified yearly rental until the well was to be drilled; and it also was alleged that one well was drilled but no oil developed, upon which it was abandoned; that the plaintiff lessor had re-entered the premises; and that after the abandonment of the well the lessees had assigned their contract to the defendant, it was held that the complaint was not sufficient, there being no showing of a failure on the part of the lessee to perform any covenant, and the fact that the unproductive well was abandoned did not entitle the lessor to a forfeiture. *Logansport, etc., Gas Co. v. Ross*, 32 Ind. App. 638; 70 N. E. Rep. 544; *Beatty-Nickle Oil Co. v. Smethers*, 49 Ind. App. 602; 96 N. E. Rep. 19.

The following analysis in one case will clearly show how a case of this kind is viewed by the courts, "But it seems to be clearly proven that Goff and Heck regarded the lease of no value, and that this is the reason for their abandoning the enterprise. Goff and Heck were both officers of the Lucky Oil & Gas Company which they had been instrumental in organizing for the purpose of developing this property. This company bored one dry well on a contiguous farm, and exhausted its funds in doing so. It hastened the completion of this well before the 29th of November, 1904, for the purpose of avoiding the payment of the each quarterly rental then to become due. As soon as the dry well was completed the Lucky Oil & Gas Company ceased to do business and surrendered its charter. Shortly after the third rental became due, Heck told Sherman Nicholson, under whom they held an oil lease in the same territory, that the Lucky Oil & Gas Company had gone out of business, and that if Nicholson wanted to give another lease on his land 'to go ahead and lease.' This witness further says that Heck told him that the reason why they did not surrender the leases was because it would cost at least \$16 to do so. John Nutter, who had also leased to them and whose lands joined the Donohue land, says that he had a conversation with Goff and Heck after the dry well was bored on the Donohue place, and that in that conversation they told him that they had nothing to do with the leases, that they had sold the leases to the Lucky Oil & Gas Company. This was after the third rental had become due to Nutter, whose lease was of the same date as the Hall lease.

Linnie Nutter, wife of John Nutter, says that Heck was at their home in January, 1906, and asked her if Nutter had leased his land, and when she told him that he had 'optioned it' he replied that he was sorry because he wanted to lease it himself. Adam Goebel who had also given Goff and Heck a lease for oil and gas on March 2, 1904, and which is also one of the leases transferred to the Lucky Oil & Gas Company by Goff and Heck, and later sold by them to Smith, the plaintiff, says that, after the third rental became due on his lease and was not paid, he had a talk with Heck about December 2, 1904, and that Heck then told him that he had nothing to do with the lease, that the Lucky Oil & Gas Company had surrendered its charter and that the lease was null and void. J. A. Epling, another one of their lessors, says that he had a conversation with Heck in January, 1906, and Heck wanted to know of him if he had leased his land, and when witness told him he had 'optioned it' Heck said that he was sorry; that he would have advanced him ten cents an acre on the first rental. Similar testimony was given by a number of other witnesses. Some of this testimony is denied by Goff and Heck, but much of it is admitted substantially as related by the witnesses. All of this testimony is in relation to conversations had between the witnesses and either Goff or Heck, before the time of the assignment of leases by Goff and Heck to H. L. Smith. They relate also to leases which Goff and Heck held upon other tracts of land in the vicinity of the Hall tract, some of which adjoined the Hall tract, and are some of the same leases which Goff and Heck turned

over to the Lucky Oil & Gas Company and which, they claim, were later returned to them by the said company at the time of its dissolution. This testimony was admissible only for the purpose of showing the intention of Goff and Heck to abandon the leases in that territory, and the Hall tract was one of them. The Hall tract was also one of the leases which had been assigned to the Lucky Oil & Gas Company. At the time when Heck wanted to know of Epling if he had leased his land, a producing well had been drilled in the neighborhood on a tract known as the "Bee tract," and interest in the oil business was very much revived thereby. This fact no doubt explains Heck's anxiety to obtain another lease from Epling at that time. All of this testimony clearly shows that Goff and Heck had abandoned whatever rights they had under their leases which had been once held by the Lucky Oil & Gas Company. The drilling of the dry well, and the expenditure of \$6,500 by the Lucky Oil & Gas Company in the drilling of it, seems to have been sufficient to satisfy Goff and Heck that they would be losing money by the payment of any further cash rentals, and they then made up their minds to abandon prospecting any further. Failure to pay the quarterly rentals, taken by itself, would not be sufficient to prove intention to abandon, but it is an evidential fact which may properly be considered in determining intention. It materially strengthens the evidence of intention to abandon which other facts tend to prove. The failure of Goff and Heck to make any exploration for oil and gas on the Hall tract for more than a year after the date of their lease, and

their failure to pay three successive quarterly rentals, taken in connection with the other facts and circumstances hereinbefore adverted to, we think clearly prove that they had abandoned their rights under the lease. Such abandonment operated as a surrender in law of their lease, and gave the Halls the right to execute the lease to Thornily, under which the defendants claim.

The fact that Goff and Heck were financially responsible for the cash rentals and that such rentals could have been collected by legal process does not affect the merits of the controversy. The Halls could waive their right to sue, and had a right to treat the contract as at an end whenever Goff and Heck voluntarily abandoned their right to make further exploration.

There is another circumstance in the record which tends strongly to show abandonment. It is this, the minutes of the stockholders' meeting of the Lucky Oil & Gas Company held for the purpose of dissolution is entered upon the book of said corporation in two places, one entry on page 9 and another on page 11 of the corporation's book. The entry on page 9 was made a few days after the meeting of the stockholders which was held on the 24th of November, 1904, and appears to have been made by A. S. Heck. The resolution authorizing the return of the leases to Goff and Heck was not entered in the body of the minutes, but was entered on the margin of the page in pencil, afterwards by him. The same minutes are re-entered on pages 11 and 12 of the corporation book by Mr. G. F. Hopkins about 14 months after the meeting, after the corporation was dissolved. This fact tends to prove two things:

§ 161. Cessure of work after operations begun.

A cessure of work will operate as a termination of a lease by abandonment, especially where the first or second well proves to be a dry one. Thus where a lease was for "fifteen years, and as much longer as oil or gas is found in paying quantities;" and the lessee erected a "rig," drilled a test well, but obtained no oil; and thereupon removed the machinery used in drilling, leaving nothing but a wooden tank, which rotted, asserting no title to the premises for nine years, when other lessees found oil in paying quantities, it was held that

(1) That Goff and Heck regarded the leases of no value and forgot to have a resolution passed providing for the return of them; and (2) that it was desirable to present to Smith an unsuspicious record which would show a return of the case to Goff and Heck by the corporation.

We think the court below was clearly warranted by the facts in finding that Goff and Heck had voluntarily abandoned their rights under the lease from the Halls prior to the execution of the second lease by the Halls to Thornily, and finding no error in the decree of the lower court the same will be affirmed." *Smith v. Root*, 66 W. Va. 633; 66 S. E. Rep. 1005.

The preliminary right to explore for gas and oil can be lost by abandonment without the lapse of time prescribed by the statute of limitations. *Rawlings v. Armel*, 70 Kan. 777; 79 Pac. Rep. 683.

Where an oil lease provided that work should be commenced within a certain time, and that failure on the part of the lessee to complete one well should render the lease void, and the lessee commenced work within the required time, but failed to find any oil, and no further work was done for several years, when work was resumed, owing to oil discoveries in the vicinity, the conduct of the lessee amounted to an abandonment. *Bay State Petroleum Co. v. Penn Lubricating Co.*, 87 S. W. 1102, 27 Ky. Law Rep. 1133.

Where a lessee in an oil lease in effect abandoned the lease, but subsequently the lessor failed to stand by his objection to a re-entry, and acquiesced therein, and the lessee then again abandoned the property, the acquiescence of the lessor did not estop him to deny the lessee's right to return a second time. *Bay State Petroleum Co. v. Penn Lubricating Co.*, 87 S. W. 1102, 27 Ky. Law Rep. 1133.

In an action to cancel a lease and to quiet title to the real estate it covered, the complaint alleged the execution of the lease by the then owner of the real estate, and that the lessee defendant had failed to carry out its conditions, one of which required the lessee to complete three wells within one year from the date of the lease, provided each was a paying gas well, and to complete a well every 60 days until ten wells were drilled, provided each well drilled was a paying well. It also alleged that one paying well was drilled, but the defendant lessee discontinued its use and drilled no additional wells, and that he had therefor committed a breach of the conditions of the lease and abandoned it, and that his operation of wells on adjoining lands was removing the oil from under plaintiff's lands. It was held that the complaint stated a good case of action. *Beatty-Nickle Oil Co. v. Smethers*, 49 Ind. App. 602; 96 N. E. 19. (a) § 872.

the first lease had been terminated by an abandonment.⁷⁵ But a temporary suspension after the well has been sunk, which proves a dry one, while awaiting further developments in the vicinity, will not operate as an abandonment of the lease.⁷⁶ A cessure for two years, although oil has been found in paying quantities will work in equity a forfeiture of the lease.⁷⁷ Where a lease was to run fifteen years in consideration of a payment of fifty dollars, and one-eighth of the oil obtained; and the lessee covenanted to begin operations to secure oil "so as to complete the first well within six months from" the date of the lease, or thereafter within sixty days to remove all the machinery and buildings he had placed on the premises; and the lease provided that the lease should "be declared null and void unless further prosecuted after the first well drilled," and that the "time of getting oil" was of the "essence of the lease," it was held that such lease had become void, where one well had been drilled within the stipulated time, but thereafter no operations for mining purposes were prosecuted on the land during several years.⁷⁸ The fact that the cessure of work or operations was induced by the inclemency of the weather is no excuse.⁷⁹ Although a well be commenced on time, yet if it be not completed on time, the lease will terminate.⁸⁰ If a well be drilled and oil found,

⁷⁵ Calhoun v. Neely, 201 Pa. St. 97; 50 Atl. Rep. 967; Barnhart v. Lockwood, 152 Pa. St. 82; 31 W. N. C. 209; 25 Atl. Rep. 237; McNish v. Stone, 152 Pa. St. 457; 23 Pittsb. L. J. (N. S.) 232; Rorer Iron Co. v. Trout, 83 Va. 397; 2 S. E. Rep. 713; Gadbury v. Ohio, etc., Gas Co., 162 Ind. 9; 67 N. E. Rep. 249; 62 L. R. A. 895; American Window Glass Co. v. Williams, 37 Ind. App. 439; 66 N. E. Rep. 912; Rawlings v. Armel, 70 Kan. 777; 79 Pac. Rep. 683; Beatty-Nickle Oil Co. v. Smethers, 49 Ind. App. 602; 96 N. E. 19.

The lessees "were not bound to do more than make a reasonable search for oil, but they were bound to operate or quit; they could not hold or quit." Munroe v. Armstrong, 96 Pa. St. 317; Ray v. Nat-

ural Gas Co., 138 Pa. St. 576; 20 Atl. Rep. 1065; 12 L. R. A. 290.

⁷⁶ Baumgardner v. Browning, 12 Ohio Cir. Ct. Rep. 73; 5 Ohio C. D. 394. § 904, notes.

⁷⁷ Cole v. Taylor, 8 Pa. Super. Ct. Rep. 19; Crawford v. Ritchie, 43 W. Va. 252; 27 S. E. Rep. 220.

⁷⁸ Heintz v. Shortt, 149 Pa. St. 286; 24 Atl. Rep. 316.

⁷⁹ Cryan v. Ridelspergen, 7 Pa. Co. Ct. Rep. 473; Steelsmith v. Gartlan, 45 W. Va. 27; 29 S. E. 978; 44 L. R. A. 107.

⁸⁰ Cleminger v. Baden Gas Co., 159 Pa. St. 16; 28 Atl. Rep. 293.

Time is of the essence of all contracts relating to mining property. Waterman v. Banks, 144 U. S. 394; 12 Sup. Ct. Rep. 646; Island Coal Co. v. Combs, 152 Ind. 379; 53 N. E. Rep. 452.

though the lessee remove the casing and plug the well, the well is considered completed.⁸¹ If the lease require work to be commenced within a certain time, and yet does not provide when a well shall be completed, yet the lessee may not suspend work after he has commenced drilling, but must push the work with ordinary diligence until the well is completed, either as a dry or producing well. So, too, if he is to begin the development of the leased premises by a certain time, he must prosecute the work in the manner in which the business is ordinarily carried on and with ordinary diligence until the search for oil or gas is ended, either by finding it, and thereafter operating the premises, or by demonstrating that there is no oil or gas, and surrendering the leased territory.⁸² It is more especially true that the lessee must proceed to develop the territory if, after reaching oil or gas bearing rock, there be strong indications of oil or gas.⁸³

§ 162. Surrender.

A surrender involves the yielding up of the lease or the premises. It implies an action on the part of the lessee. If the lease does not give the lessee the right to surrender it or the premises, then an acceptance of it by the lessor, or at least an acquiescence that implies an acceptance, is essential to complete the act of surrender. But if the lease gives the lessee the

⁸¹ *Stahl v. Van Vleck*, 53 Ohio St. 136; 41 N. E. Rep. 35.

As to the distinction between drilling a well and completing one, see *Federal Betterment Co. v. Blaes*, 75 Kan. 69; 88 Pac. Rep. 555.

⁸² *McNish v. Stone*, 152 Pa. St. 457; 23 Pittsb. L. J. (N. S.) 232; *Ray v. Natural Gas Co.*, 138 Pa. St. 576; 20 Atl. Rep. 1065; 12 L. R. A. 290.

⁸³ *Kennedy v. Crawford*, 138 Pa. St. 561; 21 Atl. Rep. 19; *Lowther Oil Co. v. Miller-Sibley Oil Co.*, 53 W. Va. 501; 44 S. E. Rep. 433; 97 Am. St. 1027.

Where a lease provided that if the

lessee did not "commence a test oil or gas well" at a certain place "or vicinity in ninety days, this lease to be void," it was held that a test well having been completed on time and oil secured, the immediate withdrawing of the casing and plugging the well did not terminate the lease. *Stahl v. Van Vleck*, 53 Ohio St. 136; 41 N. E. Rep. 35.

An abandonment of the lease includes an abandonment of all rights under the contract. *Paine v. Griffiths*, 86 Fed. Rep. 452.

Cessure of work for three months has been held to be an abandonment. *Kennedy v. Crawford*, 138

right to make the surrender, then, of course, acceptance by the lessor is immaterial.⁸⁴ If the lessee retain and use the premises after he has delivered to the lessor a deed of release and surrender, he will be liable for the rents and royalties he was to

Pa. St. 561; 21 Atl. Rep. 19. See *Monroe v. Armstrong*, 96 Pa. St. 307; *Steelsmith v. Gartlan*, 45 W. Va. 27; 29 S. E. Rep. 978; 44 L. R. A. 107; *Huggins v. Daley*, 99 Fed. Rep. 606; 48 L. R. A. 320. See also *Federal Betterment Co. v. Blaes*, 75 Kan. 69; 88 Pac. Rep. 555.

Mere violation of an implied covenant in an oil and gas lease, after right to produce has vested by an experimental well, to operate the premises for the mutual benefit of the parties, is no ground for cancellation of the lease. *Hall v. South Penn. Oil Co.*, 71 W. Va. 82; 76 S. E. 124.

Under a mineral lease providing that if the grantee discontinued the work it would be held to have abandoned all the leased lands except 10 acres to be held for 25 years in the event "oil, gas, water, or other minerals are produced in paying quantities," the grantee's right to the 10 acres was dependent upon the enumerated substances being found in paying quantities. *Brown v. Producers' Oil Co.*, 134 La. 672; 64 So. 674.

⁸⁴ *Barnhart v. Loekwood*, 152 Pa. St. 82; 25 Atl. Rep. 237; *McKinney v. Reader*, 7 Watts (Pa.) 123; *Whitecomb v. Hoyt*, 30 Pa. St. 403.

Though the lease provide for a surrender, yet the lessor may refuse to accept a surrender where the lessee has denied liability on a covenant broken. *Heffner v. Light, etc., Co.* (W. Va.), 87 S. E. 205.

In Oklahoma under a lease reserving to the lessee the right on

payment of \$1 and all obligations then due to surrender the lease, the lessor also was held to have the right to compel a surrender of the lease. *Brown v. Wilson* (Okl.), 160 Pac. 94. L. R. A. 1917 B 1184.

Under the civil law a consideration of \$1.00 for a lease is no consideration at all, and the same may be said of \$2.00, giving the privilege of returning thereupon at any time. Therefore, an oil lease providing a consideration of \$1.00 for an oil lease and \$2.00 to retire therefrom at any time and containing an obligation to complete one well in a year is a nullity. *Murray v. Barnhart*, 117 La. 1023; 42 So. Rep. 489.

The sum of \$20, stipulated as liquidated damages for breach of a valuable oil and mineral lease, held not sufficiently large to be considered as consideration for termination of the lease. *Brown v. Producers' Oil Co.*, 134 La. 672; 64 So. 674.

A condition in an oil lease was a "potestative condition" under Civ. Code, art. 2024, where it made the execution of the contract depend upon the will of the lessee, thereby destroying the obligation which was imposed on him, which gave the lessor the right to enforce the contract. *Caddo Oil & Mining Co. v. Producers' Oil Co.*, 134 La. 751; 64 So. 684.

After a lessee has performed the obligations of an oil and gas lease, the lessor cannot annul the contract for a potestative condition per-

pay under the lease.⁸⁵ Where the lessee has the right under the lease to rescind it at any time, he may surrender the premises by parol.⁸⁶ Where a lessee ceased to work a coal mine, said he would do nothing more under the lease, completely dismantled the mine, moved off all the mining apparatus and left the mine in such a condition that it would even become valueless by caving in, and three months afterward again entered on the premises against the protest of the lessor and forcibly attempted to sink a shaft outside of the limits of shafts specified in the lease—it was held that these facts showed a surrender by mutual agreement.⁸⁷ A surrender of the lease releases the lessee from all liability thereafter (though not from liability for past rents, or possibly damages); and the surrender will be binding on both lessor and lessee; and also upon the heir. If an heir accept the surrender of the lease, it will bind his co-heirs, even though they be minors, if for their benefit.⁸⁸ The assignee of a lease may surrender it, but the surrender will not release him from a liability to the assignor assumed in the assignment, as a payment of so much for each producing well drilled.⁸⁹ If the lessor only had a life estate, and at his death the remainderman offers to continue the lease on the same terms, the lessee cannot surrender the lease before the term for which it was given has expired.⁹⁰ A lease may be surrendered after suit brought to cancel it, by way of a compromise; and a purchaser of a majority of the

mitting the lessee to remove his machinery, fixtures and improvements. *McClendon v. Busch-Everett Co.*, 138 La. 722; 70 So. 781.

⁸⁵ *Bestwick v. Ormsby Coal Co.*, 129 Pa. St. 592; 18 Atl. Rep. 538.

⁸⁶ *Hooks v. Forst*, 165 Pa. St. 238; 30 Atl. Rep. 846; *Cochran v. Shenango, etc., Co.*, 23 Pittsb. Leg. J. (N. S.) 82.

But where the contract grants to another "all the oil and gas in and under" certain land, it is such a grant of an interest in the land as requires the surrender to be in writing. *Heller v. Dailey*, 28 Ind. App. 555; 63 N. E. Rep. 490. See this

case for an extended discussion of the cases on surrender.

⁸⁷ *Worrall v. Wilson*, 101 Ia. 475; 70 N. W. Rep. 619.

⁸⁸ *Wilson v. Goldstein*, 152 Pa. St. 524; 25 Atl. Rep. 493.

⁸⁹ *Smith v. Munhall*, 139 Pa. St. 253; 21 Atl. Rep. 735; *Roberts v. Bettman*, 45 W. Va. 143; 30 S. E. 95; *Ward v. Tipple State, etc., Co.*, 131 Ky. 711; 115 S. W. 819; *Bettman v. Shadle*, 22 Ind. 542; 53 N. E. 662.

⁹⁰ *Lake Erie, etc., Co. v. Patterson*, 184 Pa. St. 364; 39 Atl. Rep. 68.

stock of the lessee (with knowledge of the compromise, at least) will be bound thereby.⁹¹ The lease may be terminated by express surrender in law affected by abandonment of the premises by the lessee and the resumption of possession by the lessor; and whether such a surrender in law has occurred is a question of intent. Thus a lease was for five years, and as long as oil and gas should be found in paying quantities, or the rental paid. After development of one paying gas well, and fruitless efforts to find oil, gas from the well was used until after the five-year period, when the well was disconnected as an exhausted well. More than three years after the last effort to find more gas or oil, the lessor executed a new lease to a stranger. It was held that a surrender of the lease had

⁹¹ Southern Oil Co. v. Wilson, 22 Tex. Civ. App. 534; 56 S. W. Rep. 429.

A document filed after a second lessee had discovered oil and gas and after suit was begun, waiving the right to surrender the optional right to dig a well or to pay rent, cannot retroactively perfect the lease. *Id.* Smith v. Guffey, 202 F. 106; 120 C. C. A. 436.

Under a lease allowing 60 days' grace in the payment of annual rents, and authorizing the lessee to surrender after 5 years, on payment of rentals to the date of surrender, the fact that the 5th annual rental was not paid until 10 days after expiration of the days of grace was held not to effect the lessee's right to surrender at the end of 5 years from the date of the lease, where the lessor was duly notified that the lease would be surrendered. *Ward v. Tipple State, etc., Co.*, 131 Ky. 711; 115 S. W. Rep. 815; 34 Ky. L. Rep.

A stipulation in a lease for five years, and as much longer as oil or gas be found in paying quantities, which gives to the lessee, on the payment of \$1.00, the right to surrender the lease for cancellation and avoid all payments and liabilities thereafter accruing under the lease, deprives the lessee of the right to enjoin a violation of the lease by the lessor. *Ulrey v. Keith*,

237 Ill. 284; 86 N. E. Rep. 696. See *Poe v. Ulrey*, 233 Ill. 56; 84 N. E. Rep. 46.

The leaving of a pipe line in the ground does not prohibit a surrender if it be abandoned, and it does not interfere with the lessor's use of the premises. *Ward v. Tipple State, etc., Co.*, 131 Ky. 711; 115 S. W. Rep. 819.

The lessee in an oil and gas lease of 20 acres, providing that, if no well be completed within 15 months, the lease should be void unless the lessee paid \$1 per day for each day's delay, and that the lessee should drill an additional well each 60 days or pay \$1 per day for each day's delay until three wells were drilled, and that he should have the right at any time to cancel the contract or any part thereof, who drilled two wells on the east 13 1-3 acres, but who failed to drill a well on the 6 2-3 acres off the west end of the tract, could not cancel the lease as to the 6 2-3 acres and escape liability for failing to drill three wells. *Ramage v. Wilson*, 45 Ind. App. 599; 88 N. E. 862.

Where a mining lease provided that the grantee might terminate the same at his election, the lease was *terminable at the will* of either party. *Tennessee Oil, Gas & Mineral Co. v. Brown*, 131 F. 696; 65 C. C. A. 524.

been effected.^{91a} And where a lessee could release any part of the tract it desired; and it need not drill any wells after drilling the first non-paying well, its failure to do so or its abandonment of a well drilled was held not to be an abandonment of its exclusive right to drill on any unreleased part during the year, nor was the release of a third part of the tract an abandonment of the whole tract for drilling purposes.^{91b} If the lease prescribed the manner in which it may be surrendered, then the mode prescribed must be followed, unless the consent of the parties thereto be given to a surrender in some other manner.^{91c}

§ 163. Surrender of premises which are not definitely described.—Selection by lessee.

The fact that the lease contains an insufficient description of the land leased will not render that part of the contract relating to a surrender void. And if the lessee has a right to surrender a part of a definitely described piece of real estate, the fact that the part is indefinitely described will not render that part of the contract relating to the surrender void if he has the right to select the part to be surrendered. In passing upon this question one court said: "It is obvious that such a case does not fall within the principle of that class of cases in which it is adjudged that nothing passes by the deed when the terms are so uncertain that the intention of the parties cannot be ascertained. It will be observed that the contract contains a covenant upon the part of the grantee to surrender. This, within the limits, gave the grantee the power of selection, and the mere fact that the land which he might select to reconvey was originally uncertain does not prevent an enforce-

A surrender clause in an oil and gas lease, giving the lessee the option to surrender it before the expiration of its term, upon the payment of \$1, but not giving the lessor the right to compel a surrender, did not create a tenancy at will, and hence did not render the lease invalid for lack of mutuality. *Poe v. Ulrey*, 84 N. E. 46; 233 Ill. 56.

In *Heller v. Dailey*, 28 Ind. App. 555; 63 N. E. Rep. 490, a surrender of a grant by a land owner to an-

other of "all the oil and gas in and under" a certain tract of land, and providing penalties for delay in the drilling of the wells, it was held could not be made unless in writing.

^{91a} *Sult v. Hockstetter Oil Co.*, 63 W. Va. 317; 61 S. E. Rep. 307.

^{91b} *O'Neil v. Sun Co.* (Tex. Civ. App.), 123 S. W. Rep. 172.

^{91c} *Aridzonne v. Archer* (Okl.), 160 Pac. 446.

ment of the undertaking according to its terms.^{91a} There is no more of legal uncertainty in such a matter as this than there is in the case of a way of necessity where the reservation implied as vesting on the presumed intention of the parties."^{91b} Therefore, where a lease provided that the lessee when it failed to operate one well for a period of sixty days, or to pay the lessor \$1 per day from the time it fails to operate the well, "the ten acres on which" the well was located should "be cancelled and returned to" the lessor, was not void as to that part relating to the surrender, although the leased premises was a very large tract of land. "Therefore," said the court, "since the lessee had the power to select the particular tract to reconvey, it cannot be heard to say that the clause is unenforceable because of uncertainty in the description."^{91c} But it is entirely a different proposition when the lessor endeavors to quiet title to so much of the land as is undeveloped, in such an instance. Thus the owner of lands sought to quiet his title when his contract provided for putting down eight wells for oil and gas on a certain tract, and it contained a stipulation that "on failure to drill any of these wells within the specified time, the second party shall surrender the right to drill on all of this grant excepting ten acres for each well drilled," it was held that the owner could not maintain an action to quiet his title to the undeveloped part of the tract, because the stipulation was so uncertain that it did not apply to any part of it.^{91d}

§ 164. Surrender by substitution of tenants or assignments of lease.

Without discussing whether a surrender must be evidenced by a writing, that having been discussed elsewhere, we will take up the question in this section of a surrender by substitution of tenants and to instances of an assignment of the lease

^{91a} Citing *Smith v. Furbish*, 68 N. H. 123; 44 Atl. Rep. 398; 47 L. R. A. 226; *Gardner v. Webster*, 64 N. H. 520; 15 Atl. Rep. 144; *Dull v. Blum*, 68 Tex. 299; 4 S. W. Rep. 489; *Nye v. Moody*, 70 Tex. 434; 8 S. W. Rep. 606; *Dohoney v. Womack*, 1 Tex. Civ. App. 354. 19 S. W. Rep. 883; 20 S. W. Rep. 950; *Waters v. Bew*, 52 N. J. Egr. 787; 29 Atl. Rep. 590; *Lane v. Allen*, 162 Ill. 426;

44 N. E. Rep. 831; 1 Jones, Real Property Conveyancing § 334.

^{91b} *Jones v. Mount*, 166 Ind. 570; 77 N. E. Rep. 1089.

^{91c} *Perry v. Acme Oil Co.*, 44 Ind. App. 207; 88 N. E. Rep. 859, reversing 80 N. E. Rep. 174.

^{91d} *Jones v. Mount*, 166 Ind. 570, 77 N. E. Rep. 1089; *Parsons & Sweeney Oil Co. v. McCormick*, 68 W. Va. 604; 70 S. E. 471.

by the lessee to third persons, the latter usually, if not always, being evidenced by a writing. And it may be stated generally, that if the laws will imply a surrender in a given instance, it is reasonably clear that the implication will arise from the acts of the parties, and need not be based upon proof of an oral agreement between the lessor and lessee. "The one, whether lessor or lessee, against whom such a surrender is asserted by the other, must have been a party to some action from which a surrender may properly be presumed by the court. The surrender should be indicated by acts."⁹² "If the lessee assign to a third person and the lessor accept rents from the assignee in peaceable possession, it may be presumed from this act of the lessor in accepting the rent due from his lessee through the hands of another in possession, that the lessor acquiesces in the assignment, but such conduct does not necessarily indicate that the lessor has been a party of the creation of a new tenancy. Such facts may constitute evidence of an assignment but not of a surrender, and if a surrender may be established by the further proof of a parol agreement between the lessor and the lessee, to which the assignee was not a party, this would be basing the essential fact constituting the surrender upon parol evidence of an express contract, and not deriving it by act and operation of law."⁹³ It therefore follows that a plea alleging that the lessee entered into negotiations with a third party named, and notified the lessor, who encouraged the lessee to sell and assign the lease to a third party, and therefore the lessee duly assigned and conveyed the lease to such third party, who entered upon the demised premises and was duly accepted as his tenant, and that the lessor collected rent from the assignee and recovered a judgment for rent which afterwards fell due, is insufficient, for it needed an averment that the assignee was substituted in place of the original lessee, with intent on the part of the parties to the demise to annul the obligation of the lease.⁹⁴ An assignment of the lease by the lessee does not release him from his liability to

⁹² *Heller v. Dailey*, 28 Ind. App. 555; 63 N. E. Rep. 490; *Parish Fork Oil Co. v. Bridgewater Gas Co.*, 51 W. Va. 583; 42 S. E. Rep. 655; 59 L. R. A. 566.

⁹³ *Heller v. Dailey*, *supra*.

⁹⁴ *Creveling v. De Hart*, 54 N. J. L. 338; 23 Atl. Rep. 611.

pay the rent due under it, even though the lessor collect rent from the assignee, and these acts, of course, are not equivalent to a surrender.⁹⁵ "Nor did the sale of the saloon by the tenant to Ruse," in the language of one court, "nor the taking of possession by Ruse, nor the acceptance of rent from the latter by the landlord, operate as a discharge of the grantors. The assignee of a leasehold estate is liable for the rent according to the terms of the lease, and the fact of his liability after the assignment does not discharge the lessee from his covenant to pay rent. In case the rent is not paid by the assignee as it becomes due, an action may be sustained against the lessee therefor; and it makes no difference, in this respect, that the lessor may have received rent from the assignee, and accepted him as tenant of the premises."⁹⁶ Where there is an express covenant to pay rent for a term of years, the mere acceptance of rent by the lessor from the assignee of the lessee does not discharge the lessee.⁹⁷ The contract of the latter continues in force, notwithstanding he may have parted with his interest in the estate, unless the lessor enters into such stipulations with the assignee as to accept him as sole tenant and absolve the original lessee. If there be not a substitution of the assignee in place of the original lessee, and a clear intent to make a new contract with the former to discharge the latter from further liability under the lease, both will be held liable to the lessor."⁹⁸ In order to prove a surrender, however, it is not necessary to show an express contract between the lessor and lessee; but it must be shown that the landlord by his conduct, as between himself and the assignee, "does not hold the latter merely to the obligation of an assignee of the term in possession, but has assumed an

⁹⁵ *Frank v. Maguire*, 42 Pa. St. 77; *Sanders v. Sharp*, 153 Pa. St. 555; 25 Atl. Rep. 524.

⁹⁶ Citing *Shaw v. Partridge*, 17 Vt. 626.

⁹⁷ Citing *Harris v. Heackman*, 62 Ia. 411; 17 N. W. Rep. 592.

⁹⁸ *Grommes v. St. Paul Trust Co.*, 147 Ill. 634; 35 N. E. Rep. 820; 37 Am. St. Rep. 248. See also *Way v.*

Reed, 6 Allen 364; *Hoerd v. Hahne*, 91 Ill. App. 514; *Detroit Pharmacal Co. v. Burt*, 124 Mich. 220; 82 N. W. Rep. 893; *Charles v. Froebel*, 47 Mo. App. 45; *Levering v. Langley*, 8 Minn. 107; *Lyon v. Reed*, 13 M. and W. 285; *Lynch v. Lynch*, 6 Irish L. R. 131; *Lewis v. Brooks*, 8 U. C. Q. B. 576.

attitude inconsistent with the continuance of the contract relation between him and the original lessee, and has treated the assignee as his own tenant by substitution." ⁹⁹ The taking of a new lease from a third party, or even from the first lessee, and putting the new lessee in possession of the premises, is a surrender, and nothing farther is required to make it effectual. ¹⁰⁰

§ 165. Parol surrender.

If the written instrument, under which the lessee or grantee, or by whatever name he is designated, grants or gives an interest in the land, then, as we have seen, the surrender must be in writing; ¹⁰¹ but if it be a mere lease, not under seal, although written and not giving an interest in the land, then it may be surrendered and released by parol. ¹⁰² Any notice is sufficient that definitely informs the adverse party that the lease has

⁹⁹ *Heller v. Dailey*, *supra*.

¹⁰⁰ *Coe v. Hobby*, 72 N. Y. 141.

A verbal agreement by which defendants were authorized to enter into a mining claim and extract ore therefrom during plaintiff's will and pleasure, and with the understanding that the privilege should terminate whenever plaintiff might desire, created in defendants merely a license revocable at plaintiff's pleasure, and gave defendants no interest or right in the realty, but merely a property in the ore which they actually took from the mine. *Clark v. Wall*, 79 P. 1052, 32 Mont. 219.

¹⁰¹ *Heller v. Dailey*, 28 Ind. App. 555; 63 N. E. Rep. 490.

Where A. and B., owning adjoining tracts, leased the same to C. for the purpose of prospecting for oil and other minerals, and within 30 days B. leased his tract to C. for one year and on different terms, the lessee binding himself to develop the property, and the royalty being made payable to B. alone, the first lease was abandoned and terminated

and was no longer binding on A. *Martel v. Jennings-Heywood Oil Syndicate*, 38 So. 253, 114 La. 351.

¹⁰² *Donahoe v. Rich*, 2 Ind. App. 540; 28 N. E. Rep. 1001; *Rhodes v. Thomas*, 2 Ind. 638; *Ward v. Walton*, 4 Ind. 75; *Knarr v. Conaway*, 42 Ind. 260; *Stockton v. Stockton*, 40 Ind. 225; *Wood L. and T., Sec. 492*; *Terstegge v. First German, etc.*, 92 Ind. 82; *Parish Fork Oil Co. v. Bridgewater Gas Co.*, 51 W. Va. 583; 42 S. E. Rep. 655; 59 L. R. A. 566; *Hooks v. Forest*, 165 Pa. 238; 30 Atl. Rep. 846; *Cochran v. Shenango, etc., Co.*, 23 Pittsb. Leg. J. (N. S.) 82; *Heller v. Dailey*, 28 Ind. App. 555; 63 N. E. Rep. 490.

Where a penalty was imposed only for not drilling a well within a certain prescribed time, a lessee's failure to give a written notice of the termination of the lease was held not to render him liable for the penalty provided for not drilling a well within such time. *May v. Hazelwood Oil Co.*, 152 Pa. St. 518; 25 Atl. Rep. 564.

been surrendered, but the original lease ought to be destroyed or delivered to the lessor; and if it has been recorded, it can only be surrendered by an entry on the margin of the record, or by an instrument signed and acknowledged by the lessee.^{102a} The landowner may waive a written notice, though the lease call for such an one.^{102b}

§ 166. **Reservation of right to surrender lease.—Completion of surrender.**

A lease may give the lessee the right to surrender the lease upon payment of a sum of money named; and it is not void for mutuality.^{102c} And where a lease gave the lessee the right to cancel his lease by giving the lessor written notice of his intention, by paying him an additional sum, and by releasing of record the lease, it was held that he might, upon performance of the conditions determine the lease, though it normally extended over a period of time not yet expired. In this case the contract called for a release of record, and it was held that until there was a release of record entered by the lessee, as well as a giving of a written notice, there was no release; for the lessor was not bound to incur the expense of releasing the lease of record.^{102d} Such a lease cannot be specifically enforced by the lessor, upon the ground that whenever a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it against the other; and unless a contract can be specifically enforced as to all parties equity will not interfere.^{102e} If the lessee must pay damages for failure to drill an oil well, or, at his option, release

^{102a} Ward v. Tripple State, etc., Co., 131 Ky. 711; 115 S. W. Rep. 819.

^{102b} Payne v. Neurol, 155 Cal. 46; 99 Pac. Rep. 476.

Where an oil and gas lease provides that it may be surrendered by the parties, the indorsement thereon of its cancellation and surrender, whether such indorsement is entitled to record on the margin of the lease record or not, constitutes a legal cancellation and surrender, though the statutory provision that any interest in land must be granted

by an instrument duly executed, acknowledged and attested by witnesses. Marks v. Rushville Gas & Oil Co., 30 Ohio Cir. Ct. R. 798.

^{102c} Watford Oil & Gas Co. v. Shipman, 233 Ill. 9; 84 N. E. Rep. 53; 122 Am. St. —; Poe v. Ulrey, 233 Ill. 56; 84 N. E. Rep. 46, affirming 134 Ill. App. 298.

^{102d} Scott v. Lafayette Gas Co., 42 Ind. App. 614; 86 N. E. Rep. 495.

^{102e} Ulrey v. Keith, 237 Ill. 284; 86 N. E. Rep. 696.

the premises, his failure to exercise his right of option to release the land entitles the lessor to recover damages, as provided in the lease.^{102f}

§ 167. Payment of rental instead of developing premises.

As a general rule a lessee cannot prolong the life of a lease by the mere payment of rental,¹⁰³ especially where he has a certain period within which to develop it. Thus where the lease was for two years "and as much longer as oil or gas is found in paying quantities or the rental paid thereon," and it provided for a rent of one-eighth of the oil and two hundred and fifty dollars a year for the gas, and required one well to be completed within a month or fifteen dollars per month to be paid in advance for the delay until one well should be completed; and it also provided that a failure to complete one well or make such payments for the delay should render the lease void, at the option of the lessor, it was held that it did not give the lessee a right to continue the lease by paying the fifteen dollars per month after the expiration of two years, after the beginning of operations.¹⁰⁴ Where a lease was given for two years, and if no well was drilled within

^{102f} *Steel v. People's Oil & Gas Co.*, 147 Ill. App. 133.

Where a gas company surrendered, on action by its directors, the franchises over a portion of the territory occupied by it without objection of its stockholders, creditors, or the state, it was held that the landowners within such territory had no standing to question the act of the company, though they were previously served by it. *Germania Refining Co. v. Alum Rock Gas Co.*, 226 Pa. 433; 75 Atl. Rep. 715.

¹⁰³ *Brown v. Fowler*, 65 Ohio St. 507; 63 N. E. Rep. 76; *Gadbury v. Ohio, etc., Co.*, 162 Ind. 9, 67 N. E. Rep. 259; 62 L. R. A. 895; *American Window Glass Co. v. Williams*, 30 Ind. App. 685; 66 N. E. Rep. 912; *Indiana Natural Gas & Oil Co. v. Beales*, 166 Ind. 684; 76 N. E.

Rep. 520; *Western Penn. Gas Co. v. George*, 161 Pa. St. 47; 34 W. N. C. 332; 28 Atl. Rep. 1004; *Murdock-West. Co. v. Logan*, 69 Ohio St. 514; 69 N. E. Rep. 984; *Indiana Natural Gas & Oil Co. v. Granger*, 33 Ind. App. 559; 70 N. E. Rep. 395; *Logansport & W. V. Gas Co. v. Seegar*, 165 Ind. 1; 74 N. E. Rep. 500; *Dill v. Frazee*, 165 Ind. 53; 79 N. E. Rep. 971; 77 N. E. Rep. 1147; *Armitage v. Mt. Sterling Oil & Gas Co. (Ky.)*, 80 S. W. Rep. 177; 25 Ky. L. Rep. 2262; *North Western, etc., Co. v. Whitacre*, 30 Ohio Cir. Ct. Rep. 737.

¹⁰⁴ *Bethman v. Harness*, 42 W. Va. 433; 26 S. E. Rep. 271; 36 L. R. A. 566; a similar decision in Pennsylvania was rendered; *Western Pennsylvania Gas Co. v. George*, 161 Pa. St. 47; 34 W. N. C. 332; 28 Atl.

twelve months it was to become void, unless the lessee paid for further delay at the rate of one dollar per acre at or before the end of the second year, it was held that the payment of one dollar per acre did not extend the lease beyond the two years; and no oil having been found within two years, the right to drill for oil ceased.¹⁰⁵ But in Pennsylvania where a lease provided that the lessee had "the option to drill the well or not, or pay said rental or not, as he may elect," it was held that the lease did not give the lessee the option to pay a periodical rental, as was provided in the lease, or drill a well if it so pleased him, but he was bound to either drill a well and so pay no rental, or pay the rental and not be compelled to drill the well. "It is not for the lessor," said the court, "but it is for the lessee to elect which he will do. This option was deducible from the stipulations of the lease, but the parties chose to put it in words and make it a part of the contract. The contention of the defendant destroys the character of the whole contract. It makes the lessee say that he will drill a well within a given time, or, failing to do so, that he will pay a monthly rental, but that he will do neither unless it pleases him; and if he does neither he shall be liable in no manner for his breach of contract. Such a construction is so unjust and absurd that the words relied upon as requiring it must be plain and unambiguous, and must be incapable of an exposition in harmony with the body of the contract before we can consent to adopt it."¹⁰⁶ Unless the annual rent is payable in advance,

Rep. 1004. [Followed in *Indiana Natural Gas & Oil Co. v. Granger*, 33 Ind. App. 559; 70 N. E. Rep. 395.] See also *Detlor v. Holland*, 57 Ohio St. 492; 49 N. E. Rep. 690; 40 L. R. A. 260.

¹⁰⁵ *Brown v. Fowler*, 65 Ohio St. 507; 63 N. E. Rep. 76.

Upon a sufficient consideration the owner of land gave a lessee the exclusive right for ten years to enter on such land and prospect for oil and gas; and if oil or gas was found in paying quantities, the privilege of operating the wells was given so long as they produced oil or gas in paying quantities. The agreement further provided that if

no gas well was drilled on the premises within five years it should be void, unless the lessee elected from year to year to continue it by paying \$40 each year in advance until a well was completed on the premises. It was held that this was a grant of a term for ten years, conditioned on the payment of \$40 per year in advance after the expiration of the first five years. *Monfort v. Lanyon Zinc Co.*, 67 Kan. 310; 72 Pac. Rep. 784.

¹⁰⁶ *McMillan v. Philadelphia Co.*, 159 Pa. St. 142; 28 Atl. Rep. 220.

A failure on the part of the lessee for two years to develop the prem-

by the terms of the lease, it need not be so paid in order to keep the lease alive.^{100a} Where there was an annual rental and free gas to be furnished, it was held that the lessor could not terminate the lease so long as he used the gas.^{100b} A contract granting the exclusive right to drill and operate gas and oil wells for the term of three years, and as much longer as gas and oil are found in paying quantities, in consideration for which the operators were to pay a royalty on oil produced and \$300 per well for gas, and, in case no well be drilled within the first six months, a stipulated rental per year, terminates upon the expiration of three years unless oil or gas is produced in paying quantities. Payment of yearly rental and tender of \$300 per year for non-producing gas well will not effect an extension of its terms. Neither will a separate agreement upon consideration three years and eight months after the date of the contract, granting an extension to a fixed date more than a year in the future, the terms of which are indorsed on the original agreements, continue the original contract in force beyond such fixed date, especially since no new or further efforts were made to develop oil or gas on the premises.^{100c}

ises; after drilling a well, finding gas, and then closing it, *prima facie* authorizes the lessor, who was to be paid \$100 per annum for each well while gas was being used off the premises, without demand, to treat the grant as abandoned. *Gadbury v. Ohio, etc., Gas Co.*, 162 Ind. 9; 67 N. E. Rep. 259; 62 L. R. A. 895. See also *American Window Glass Co. v. Williams*, 30 Ind. App. 685; 66 N. E. Rep. 912.

^{100a} *Rhodes v. Mound City Gas, etc., Co.*, 80 Kan. 762; 109 Pac. Rep. 851.

^{100b} *King v. Morristown F. & L. Co.*, 31 Ind. App. 476; 68 N. E. Rep. 310.

^{100c} *North Western Ohio Nat. Gas Co. v. Whitacre*, 30 Ohio Cir. Ct. Rep. 737.

Under a contract between an owner of oil lands giving an oil company the right to bore or to

pay a quarterly rental, or to surrender the grant at any time upon the payment of \$5 to the owner, the company, though without notice that the owner would refuse one of the quarterly rental payments, held not to have a reasonable time after such refusal to begin boring a well. *Owens v. Corsicana Petroleum Co.* (Tex. Civ. App.), 169 S. W. 192.

Under an oil and gas lease reserving to the lessee the right, on payment of \$1 and all obligations then due, to surrender the lease, the lessor also had the right to compel surrender of the lease. *Brown v. Wilson* (Okla.), 160 P. 94; L. R. A. 1917 B 1184.

An oil and gas lease held not to require the lessors to tender of one-half of the cost of a second well not then begun, before declaring the lease forfeited, under the terms of the lease, for the lessees'

§ 168. When payment of rent must be made to prevent a forfeiture.

Of course the rent must be paid on or before the day it is due. If it is due on a certain day, then, under the well recognized law of payment the lessor cannot be required to accept it before that day; and a tender before such day not followed up by a payment or tender on the day the rent is due, is unavailing to prevent a forfeiture, but the conduct of the lessor may be such as to constitute a waiver of the right to declare a forfeiture for neglect to make payment on the day the rent is due; as, for instance, the acceptance of rent at various prior rent periods after it is due, without protest and the failure to give notice to the lessee that a forfeiture will thereafter be declared if the rent is not promptly paid on the day fixed for its payment in the future. So a forfeiture will not be declared for failure to make prompt payment where it would be unconscionable. Thus where the lessee after paying rent promptly for thirteen years, sent his check on the fourteenth year so it reached the lessor the day after the rent was due, it was held that a forfeiture for failure to pay the rent when due would be unconscionable and would not be permitted.^{106d}

§ 169. Liability of lessee for rent on an optional right to pay rent.

If the lessee, or person rather holding the option, has the right to pay periodically a named sum of money for a named period of time to keep his right alive to develop the premises, such a right is personal to himself. He may exercise it if he sees fit, but his lessor cannot enforce him to pay the sum named in the lease or option. In an Indiana case it was said: "Viewed from end to end, the contract amounts to nothing more or less

failure to continue operations. *Dittman v. Keller*, 55 Ind. App. 448; 104 N. E. 40.

A lessee has all the day on which rents become due to make payment, and his lease is not forfeited by a "30 days notice" given on the

afternoon of the day the rent becomes due. *Nelson v. Scott*, 86 Kans. 492; 121 Pac. 746.

^{106d} *McKean v. Natural Gas Co. v. Wolcott*, 254 Penn. 223; 98 Atl. 955.

than a six months' option with the right of renewal, based upon a valid consideration, whereby the grantor bound himself not to lease the premises to another, and to give the grantee that length of time to consider and determine whether it would undertake the development of the land upon the terms named. . . . The rent or option money was paid in accordance with the contract to August, 1897, and included the six months ending at that time. Suppose, as the fact was, that thereafter for four years the covenant did not drill a well, make a payment, or have possession and that the appellee at that time brought an action to recover back rent, or option money, could it be said, under the contract in such case, that non-assumpsit would not have been a complete answer? Could not appellant, Ohio Oil Co., have successfully said to appellee: 'I did not promise to pay you any money?' And it is certain that if the said appellant has the right to enter after the expiration of said period, it was liable for the rent. Contractual rights and obligation are correlative." The court holds that the lessor could not have enforced a payment of the rentals if the lessee had not obligated itself to pay them; nor, on the other hand, was the lessor obligated to permit the lessee to enter after such forfeiture by failure to pay rent.^{100e} There are other cases to the same effect, thus it is said: "If the lessee did not wish to postpone the exercise of such right [for a postponement], he had only to refrain from making the payment."^{100f}

§ 170. Recision for fraud.

An oil or gas lease may be terminated or rescinded for fraud; but a very strong case must be made out to secure a recision. A representation that undeveloped land contains oil or gas is regarded as a matter of opinion, and the purchaser is bound so to understand it; because of the uncertainty attending all

^{100e} Ohio Oil Co. v. Detimore, 165 Ind. 243; 73 N. E. 906.

^{100f} Glasgow v. Chartiers Oil Co., 152 Penn. 48; 25 Atl. 232; 31 W. N. C. 207; affirming 22 Pittsb. L. J. (N. S.) 181, distinguishing Ray v. Gas Co., 138 Penn. 576; 20 Atl. 1065; 12 L. R. A. 290; Snodgrass v.

South Penn. Oil Co., 47 W. Va. 509; 35 S. E. 820; Van Ettan v. Kelly, 66 Ohio St. 605; 64 N. E. 560; Frank Oil Co. v. Belleview Gas & Oil Co., 29 Okl. 719; 119 Pac. 260; 43 L. R. A. (N. S.) 487; Brown v. Wilson (Okl.), 160 Pac. 94; Hill Oil & Gas Co. (Okl.), 157 Pac. 710.

mining operations for gas or oil.¹⁰⁷ But if the grantor or lessor actually knows that no oil or gas lies beneath the surface, or if he has taken active steps to produce a false impression derived from an examination of the premises—(as in “salting” a silver or gold mine)—then the representations are more than an opinion, and if false, and they induce the sale or acceptance of a lease, then such a fraud will authorize a rescission of the contract of purchase or acceptance of the lease.¹⁰⁸ The fact that the purchaser, who has brought an action to rescind a purchase he has made on the ground of fraud, has used a quantity of oil which he has received from the property, will not necessarily defeat his action; but he may be granted relief on the payment of the value of the oil, which his own act has rendered impossible for him to restore.¹⁰⁹ The fact that the lessor did not know land he was leasing for agricultural purposes or selling contained oil or gas is not sufficient to avoid the lease for fraud, even though he was at the time confined in the penitentiary and could not, of course, go and examine it, and even though gas and oil in paying quantities had been developed nearby, or within two miles, if the lease or sale be otherwise equitable. But if the agent of the lessee or purchaser, knowing that oil had been produced in the vicinity, and knowing that the owner is ignorant of that fact, represents that the terms offered are sufficient the lease or sale will be void for fraud, especially if such agent was acting for such owner in an effort to secure for him a pardon.¹¹⁰ A court will not award a rescission of a contract made by parties on equal footing, especially when to grant relief is as liable to be wrong as right.¹¹¹ Nor will relief be given though the terms are harsh or unjust, on the grounds that the person complaining did not use good business judgment, if the parties stood

¹⁰⁷ *Holbrook v. Connor*, 60 Me. 578; *Gordon v. Butler*, 105 U. S. 553 (a case of stone).

¹⁰⁸ *Mudsill Mining Co. v. Watrous*, 61 Fed. Rep. 163; 9 C. C. A. 415; as to placing in *statu quo*, see *Reeves v. Corning*, 51 Fed. Rep. 74; *Billings v. Alsen Mining, etc., Co.*, 51 Fed. Rep. 338; *Thackarah v. Haas*, 119 U. S. 499; 7 Sup. Ct.

Rep. 311; *Gross v. Scott Mfg. Co.*, 48 Fed. Rep. 35.

¹⁰⁹ *Basye v. Paola Refining Co.*, 79 Kan. 755; 101 Pac. Rep. 658; 25 L. R. A. (N. S.) 1302.

¹¹⁰ *Moon v. Sawyer*, 167 Fed. Rep. 826; *Guffey v. Clever*, 146 Pa. 548; 23 Atl. 161.

¹¹¹ *Gillespie v. Fulton Oil & Gas Co.*, 236 Ill. 188; 86 N. E. Rep. 219.

on an equal footing.¹¹² A false representation by a would-be-lessee that he is a producer of oil, made to induce the landowner to give him a lease, is not such a material misrepresentation as will justify the court in setting aside the lease.¹¹³ Nor can there be a cancellation of the lease if there be no proof the landlord relied upon the representations of the lessee.¹¹⁴ So where a lessee falsely represented that he had a drill which he was bringing to the oil field and that it would be put in operation inside of thirty days, and in reliance thereon the lease was executed wherein it was provided that on a failure to drill an oil well within six months the contract should be void, it was held that an action to set aside the lease on account of fraud could not be maintained.¹¹⁵ But because of the peculiar nature of oil and gas, both the quantity and location of land covered by an oil and gas lease are elements going to the essence of the contract of *sale* of such a lease, obligating the vendee to develop the property and deliver a part of the product free of cost, and a gross misrepresentation as to either relied upon by the vendee is good ground for a rescission.¹¹⁶ So where both the seller and producer of an oil well believed that it was an oil-producing well, when it had been salted by the vendor's assignors, it was held that the purchaser could cancel his lease and recover back the purchase money, and that he was not precluded because of the speculative character of the property.¹¹⁷ The fact that the plaintiff

¹¹² *Poe v. Ulrey*, 233 Ill. 56; 84 N. E. Rep. 46.

¹¹³ *Gillespie v. Fulton Oil & Gas Co.*, 236 Ill. 188; 86 N. E. Rep. 219.

¹¹⁴ *Gillespie v. Fulton Oil & Gas Co.*, *supra*.

¹¹⁵ *Ruggles v. Spindle, etc.*, Gas Co., 72 Kan. 662; 83 Pac. Rep. 399.

¹¹⁶ *Bruner v. Miller*, 59 W. Va. 36; 52 S. E. Rep. 995.

¹¹⁷ *Rowland v. Cox*, 121 Ky. 341; 89 S. W. Rep. 215; 28 Ky. L. Rep. 307.

In this case the lease provided that the lessees should sink the well to the "first sand," and if the well did not produce oil the lease should be null and void, but the lessees,

after driving the well to a depth of 489 feet, salted and abandoned it. It was held that their assignees were estopped to defend a suit for cancellation of their conveyance of an interest therein on the ground that, if the well had been sunk to the "first sand," it might have produced oil.

Plaintiff, who was the owner of gas land, leased certain of it to a corporation for the purpose of drawing gas therefrom. Thereafter T. applied to him to lease certain other lands for the same purpose. Plaintiff refused to make a lease if it was intended to do anything to injure the other lessee, but, on being

executed an agreement with the defendant providing for delay, will not deprive the plaintiff of his right to forfeit a lease for failure to prosecute the work with diligence and good faith, where it appears that the defendant's purpose in securing the agreement was fraudulent, the plaintiff not being aware of such purpose at the time of its execution.¹¹⁸

assured that such was not the intent, leased the land to T., and thereafter defendant corporation was organized, and expended \$20,000 putting down gas wells and establishing a lampblack factory on the ground. Gas in large quantities was obtained from defendant's wells which was wasted by defendant to the injury of the other lessee. It is held that such facts did not justify a cancellation of defendant's lease on the ground of fraud, plaintiff and the other lessee being protected by statute against defendant's further waste of the gas. *Louisville Gas Co. v. Kentucky Heating Co.*, 117 Ky. 71; 77 S. W. 368; 25 Ky. Law Rep. 1221; 70 L. R. A. 558; 111 Am. St. 225.

¹¹⁸ *J. M. Guffey Petroleum Co. v. Oliver* (Tex. Civ. App.), 79 S. W. Rep. 884.

Where an owner of agricultural land executed an oil and gas lease providing that, if it should be detrimental to a sale of the place, the lease should be returned to him, such provision should be construed only to require a reversion if the lease was detrimental to a sale of the land for agricultural or other purposes to which it was then devoted, and did not authorize a reversion to permit the lessor to dispose of his oil rights to greater advantage. *Duntley v. Anderson*, 169 Fed. 391.

Where a lessor and lessee in an oil and gas lease stood, at the time of the making of the lease, on equal footing, and no fiduciary relation existed between them, the lessee

was not required to give the lessor any information which he had, but, if he volunteered any information to induce the execution of the lease, he must give all the information or he may be chargeable with fraud. *Prout v. Hoy Oil Co.*, 263 Ill. 54; 105 N. E. 26.

Where a widow owning a dower interest had executed an oil and gas lease and thereafter executed second lease to a third person, who expressed the opinion that the first lease was invalid on the ground that she had the advice of her son-in-law before executing the second lease, the second lease was not invalid, as having been procured by fraud. *Prout v. Hoy Oil Co.*, 263 Ill. 54; 105 N. E. 26.

Any defect in a mineral lease held cured by the commencement of the work by the lessee at the lessor's instance and request, though the lease may have been potestative in the beginning. *Hudspeth v. Producers' Oil Co.*, 134 La. 1013; 54 So. 891.

A delay of 16 months after the execution of the lease in bringing suit to have it cancelled, is not fatal to securing its cancellation in the absence of evidence that the situation has so changed as to render its enforcement inequitable. *Mexico-Wyoming Petroleum Co. v. Valentine*, 237 Fed. 539. But a delay of 6 years, when the basis of the action was fraudulent representation, which became known to the lessee soon after its execution, was held fatal. *Thompson v. Milikin*, 93 Kans. 72; 143 Pac. 430.

CHAPTER V.

FORFEITURE OF LEASE.

- § 171. Forfeiture not a favorite of the law.
- § 172. Rule in gas or oil leases.
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- § 174. Forfeiture favored by equity when it will promote justice.
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- § 210. Abandonment a question of intention.

- § 211. Forfeiture a question for jury.
- § 212. Suit to cancel lease for non-development of territory.
- § 213. Relief from forfeiture.
- § 214. Time to avoid forfeiture.
- § 215. Lessee cannot recover premises after forfeiture.
- § 216. Reimbursement for expenses.
- § 217. Removal of fixtures and machinery.
- § 218. Damages instead of declaring a forfeiture.

§ 171. Forfeiture not a favorite of the law.

In thousands of decisions it has been declared that "forfeiture is not a favorite of the law."¹ "Conditions that work forfeitures," said the Supreme Court of Pennsylvania, "are not favorites of the law; and nothing less than a clear expression of intention that a provision shall be such will make it a condition upon which the continuance of an estate granted depends."² A court of equity will not enforce a forfeiture. It will not divest a vested estate by enforcing a forfeiture for the breach of a subsequent condition. In such a case, a party is left to his legal remedy.^{2a}

§ 172. Rule in gas or oil leases.(a)

Forfeitures, however, on the part of the lessee in a gas or oil lease, which arise by reason of his neglect to develop or operate the leased premises, are rather favored by the law, because of the peculiar character of the product to be produced.³ The reasons for this have been well stated in a Pennsylvania case as follows:

"The discovery of petroleum led to new forms of leasing land. Its fugitive and wandering existence within the limits of

¹ *Lauman v. Young*, 31 Pa. St. 306.

² *McKnight v. Kreutz*, 51 Pa. St. 232; *Westmoreland, etc., Gas Co. v. DeWitt*, 130 Pa. St. 235; 18 Atl. Rep. 724; 29 Am. L. Reg. 93; *Henderson v. Coal and Coke Co.*, 140 U. S. 25; 11 Sup. Ct. Rep. 691.

^{2a} *Craig v. Hukill*, 37 W. Va. 520; 16 S. E. 363; *Pheasant v. Hanna*, 63 W. Va. 613; 60 S. E. 618; *Headley v. Hoopengartner*, 60 W. Va. 626; 55 S. E. 144; *Newton v. Kemper*, 66 W. Va. 130; 66 S. E. 102.

Equity will not enforce a forfeiture of oil lease for breach of a subsequent condition, but will leave the complaining party to his legal remedy. *Horse Creek Coal Land Co. v. Trees*, 75 W. Va. 559; 84 S. E. 376.

(a) Cited in *Dinsmore v. Combs* (Ky.), 198 S. W. 58; see also

Soaper v. King, 167 Ky. 121; 180 S. W. 46; and *Culbertson v. Iola Portland Cement Co.*, 87 Kan. 529; 125 Pac. 81; Ann. Cas. 1914 A. 610; see also *Beatty Oil & Gas Co. v. Blanton*, 245 Fed. 979, and *Munsey v. Marnet Oil & Gas Co.* (Tex. Civ. App.), 199 S. W. 686.

³ That a gas or oil lease is construed more favorably to the lessor than to the lessee, see *Edwards v. Iola Gas Co.*, 65 Kan. 362; 69 Pac. Rep. 350; and *Gadbury v. Ohio, etc., Gas Co.*, 162 Ind. 9; 67 N. E. Rep. 259; 62 L. R. A. 895; *American Window Glass Co. v. Williams*, 30 Ind. App. 685; 66 N. E. Rep. 912; *Coffinberry v. Sun Oil Co.*, 68 Ohio 488; 67 N. E. Rep. 1069; *Lowther Oil Co. v. Miller-Sibley Oil Co.*, 53 W. Va. 501; 44 S. W. Rep. 433; 97 Am. St. 1027.

a particular tract was uncertain, and assumed certainty only by actual development founded upon experiment. The surface required was often small compared with the results when attended with success; whilst these results led to a great speculation by means of leases covering the lands of a neighborhood like a flight of locusts. Hence it was found necessary to guard the rights of the land owner, as well as public interest, by numerous covenants, some of the most stringent kind, to prevent their lands from being burdened by unexecuted and profitless leases incompatible with the right of alienation and the use of the land. Without these guards, lands would be thatched over with oil leases by subletting, and a farm riddled with holes and bristled with derricks, or operations would be delayed so long as the speculator would find it hopeful or convenient to himself alone. Hence covenants become necessary to regulate the boring of wells, their number, the time of succession, the period of commencement and of completion, and many other matters requiring special regulation. Prominent among these was the clause of forfeiture to compel performance, and put an end to the lease in case of injurious delay or a want of success. These leases were not valuable except by means of development, unlike the ordinary terms for the cultivation of the soil or for the removal of fixed minerals. A forfeiture for non-development or delay therefore cut off no valuable rights of property, while it was essential for the protection of private public interest in relation to the use and the alienation of property. In the present case the lease was modified by adding immediately after the clause of forfeiture a stipulation that, should the lessee not commence operation at a time specified, he should pay to the landlord thirty dollars for each and every month until such time as drilling should be commenced. The lessee, having paid for three months' delay, suffered eleven months to elapse without payment or tender, and then tendered the whole sum, which the landlord declined to accept, and insisted on the forfeiture, he in meantime having made a new lease to a party who went into possession. The learned judge below held that the lease was forfeited by the omission to pay the monthly sums, the lessee having done nothing in performance of his covenants.

We cannot pronounce this to be an error, in view of the nature of the lease, the true intention of the clause of forfeiture, and the want of any valuable interest acquired by the lessee, by performance. That time may be made of the essence of the contract by the express agreement of the parties has been so often decided that no citation of authority is necessary. In a case like this equity follows the law, and will enforce the covenant of forfeiture, as essential to do justice. It is true as a general statement that equity abhors a forfeiture; but this is when it works a loss that is contrary to equity, not when it works equity, and protects the land owner against the indifference and laches of the lessee, and prevents a great mischief, as in the case of such lessees. To perpetuate an oil lease forever by the payment of a monthly sum, as here, at the will or caprice of the lessee, would work great injustice. The covenant of forfeiture was not abrogated entirely, but only modified.”⁴ In a subsequent case the same court used the following language:

“The agreement is plain that if the lessees failed to get oil in one well, they had a right to put down another, and as many more as they pleased, so long as they worked with diligence to success or abandonment, and equally plain that a cessation of thirty days would end their lease. They were not bound to do more than make a reasonable search for oil, but they were bound to operate or quit; they could not hold on and be idle. The contract did not require them to keep on drilling oil wells indefinitely and without cessation, for twenty years, nor for any indefinite length of time; neither did it entitle them, after the drilling of the well, to hold the lease for twenty years without working it. Even at the beginning of the lease, the duration of the term was qualified by the words, ‘unless forfeited.’ The question seems to be, shall the concise and clear expression of the agreement of these parties, as written, give way to imaginary terms more favorable to the lessees? What is there in the circumstances calling for a fiction to defeat the covenant against delay in searching for or producing oil? . . . If a well be productive, it is the interest of both lessor and lessee that it be

⁴ *Brown v. Vandergrift*, 80 Pa. St. 142.

continuously operated till its exhaustion, but, if dry, it is of no value. Holding on to a lease after ceasing search is often for purposes of speculation, the thing which a prudent land-owner guards against. Forfeiture for non-development or delay is essential to private and public interests in relation to the use and alienation of property. In such cases as this equity follows the law. . . .

"In the rapid development and exhaustion of oil lands, cessation of work for nine months is a long period. Often in far less time the fluctuation in prices of land and leaseholds is very great. Perhaps in no other business is prompt performance of contracts so essential to the rights of the parties, or delay by one party likely to prove so injurious to the other."⁵

§ 173. History of change in rule giving lessor exclusive right to declare a forfeiture.

"A distinction formerly prevailed between a proviso declaring that the lease should be void on a specified event, and a proviso enabling the lessor to determine it by re-entry. It was held that in the former case the lease became absolutely void on the event named, and was incapable of being restored by acceptance of rent or other act of intended confirmation; whilst in the latter some act, such as entry or claim, must have been performed by the lessor to manifest his intention to end the demise, which was voidable in the interval and consequently confirmable. The force of this distinction, it is said, in Tay-

⁵ *Munroe v. Armstrong*, 96 Pa. St. 307.

This runs through all the cases: *Conkling v. Krandsky*, 112 App. Div. 761; 112 N. Y. Supp. 13; *Stahl v. Illinois Oil Co.*, 45 Ind. App. 211; 90 N. E. Rep. 632; *Gillespie v. Fulton Oil & Gas Co.*, 236 Ill. 188; 86 N. E. Rep. 219; *Ohio Oil Co. v. Detamore*, 165 Ind. 248; 73 N. E. Rep. 908.

In the absence of stipulations to that effect, a contract granting the right of operating for oil and gas

cannot be forfeited for a breach of one of its terms. *Rose v. Lanyon Zinc Co.*, 68 Kan. 126; 74 Pac. Rep. 625.

When the grantee of a mineral lease for a limited term has paid an adequate consideration in cash and has complied with all of the obligations expressly imposed upon him, the grantor is not entitled to a cancellation of the lease for the failure of the grantee to do more than the contract expressly required of him. *Cochran v. Gulf*

lor on Landlord and Tenant,⁶ has been almost, if not quite, abated by the modern decisions, which establish that the effect of a condition making a lease void upon a certain event, is to make it void at the option of the lessor only, in cases where the condition is intended for his benefit, and he actually avails himself of this privilege.*⁶ But it is entirely optional with the lessor whether he will avail himself of his right or not, although by the terms of the proviso the term is to cease or become void for the non-performance of the covenant; and if the lessor does not avail himself of it the term will continue, for the lessee cannot elect that it shall cease or be void. Where there is a proviso in a lease that on non-payment of rent the term shall cease, the lessor and not the lessee has the option of determining the lease upon a breach made.⁷ The English law in this respect had been generally followed in this country, and such a lease is held to be good until avoided; though the lessee is estopped to set it up against the lessor. A lessee cannot avail himself of his own act to vacate a lease, on the principle that no man shall be permitted to take advantage of his own wrong.⁸ So Mr. Parsons, in his Law of Contracts,⁹ referring to the distinction formerly recognized between the effect of a proviso declaring that the lease shall be void in a specified event, and a proviso enabling the lessor to determine it by re-entry, says: 'This distinction is now exploded, and it is held that the lease is voidable only at the election of the lessor, but not of the lessee, though the proviso expressly declare that it shall be void.' In Pennsylvania the older doctrine would seem at first to have been adhered to, that in a lease for years with condition, if the condition be broken by the lessee, his interest was *ipso facto* void by the breach, and no subsequent recognition of the tenancy could set it up.¹⁰ In the case cited there was a lease of land upon condition that the rent should be paid upon certain specified dates, and if a certain default was made for three months, neglect to pay after ten days' notice should render the lease null and void. The default occurred and notice was given, and it was held that after ten days the lease was *ipso facto* void, with-

Refining Co., 179 La. 1010; 72 So. Rep. 718.

⁶ Sec. 492.

*⁶ 2 Platt on Leases, 327.

⁷ Reid v. Parsons, 2 Chit. 247.

⁹ Wood's Landlord and Tenant, 1204.

⁹ Vol. I., p. 507.

¹⁰ Kenrick v. Smick, 7 W. and S. 41.

out re-entry, and could not afterwards be affirmed or continued. In *Sheaffer v. Sheaffer*¹¹ the doctrine announced by Justice Sergeant, in *Kenrick v. Smick*, *supra*, was adhered to; and English cases were brought into contrast with the doctrine of *Kenrick v. Smick*, and it is admitted that the rule of the English courts is followed in most of the States of the Union. In *Davis v. Moss*,¹² the rule of the previous cases is again apparently recognized, but its rigor is relaxed in this, that the forfeiture is said to depend upon the terms of the instrument, 'unless there be evidence to effect the landlord with a waiver of the breach, like the receipt of rent or other equally unequivocal act.' The distinction between the Pennsylvania cases referred to and the weight of authority elsewhere, therefore, would seem to be that by the former the lease, upon breach of the condition, is *ipso facto* void, unless by some unequivocal act of the lessor it is waived, whilst by the latter it is void if the lessor elects by some positive act to take advantage of it. We do not understand that in either case a re-entry is required to complete the forfeiture. This almost amounts to a distinction without a difference. In practice, the *prima facies* being different, it merely shifts the burden of proof from one party to the other. It will be observed moreover, that the Pennsylvania cases already referred to are all cases in which the forfeiture was set up by the lessor upon the default of the lessee; in none of them did the lessee set up his own default as a cause of forfeiture. No case has been called to our attention, in this or any other State, in England or elsewhere, which recognizes the doctrine that a party may take advantage of his own wrong, or set up his own default to work a forfeiture of his own contract. Persons may, of course, contract in this form and to this effect if they choose, but we do not understand the parties to this contract to have so intended. But the rigid rule of *Kenrick v. Smick* is further relaxed in the very recent case of *Galey v. Kellerman*.¹³ Thus it appears that the distinction formerly maintained between the rulings of the English courts and of the courts of our sister States, and the rulings in Pennsylvania, is no longer found to exist. We have by slow approaches at last apparently turned into the general current of cases, in which

¹¹ 37 Pa. 525.

¹³ 123 Pa. 491; 16 Atl. Rep. 474.

¹² 38 Pa. 346.

is found, without doubt, the great weight of authority, both in England and in this country."¹⁴

§ 174. Forfeiture favored by equity when it will promote justice.

A forfeiture is not always abhorred by the law, nor by equity, if its enforcement will promote justice. Speaking of one instance it was said by an appellate court: "In a case like this equity follows the law, and will enforce the covenant of forfeiture, as essential to do justice. It is true as a general statement that equity abhors a forfeiture; but this is when it works a loss that is contrary to equity, not when it works equity, and protects the landowner against the indifference and laches of the lessee, and prevents a great mischief, as in the case of such lessees."¹⁵ The courts have gone so far as to allow a specified time within which to complete a well, and if not done within that time, the lease would be declared forfeited.¹⁶

§ 175. Lessor only can declare forfeiture.

A lessee cannot set up his own default, in order to terminate the lease or escape liability under its provisions. If he make default, not keeping the covenants of the lease, it is with the lessor to declare a forfeiture, or that it shall no longer be in force. If a mining lease provide that if the mine should not be worked the lease should be void, the word "void" means

¹⁴ *Wills v. Manufacturers' Natural Gas Co.*, 130 Pa. St. 222; 18 Atl. Rep. 721; 5 L. R. A. 603.

For Pennsylvania cases, see preceding section.

¹⁵ *Brown v. Vandergrift*, 80 Pa. St. 142; *Munroe v. Armstrong*, 96 Pa. St. 307; *Parish Fork Oil Co. v. Bridgewater Gas Co.*, 51 W. Va. 583; 42 S. E. Rep. 655; 59 L. R. A. 566; *Barnsdall v. Boley*, 119 Fed. Rep. 191; *Monroe v. Armstrong*, 96 Pa. 307; *Doddridge Oil & Gas Co. v. Smith*, 154 Fed. 970; *Indiana Oil*,

etc., Co. v. McCrory, 42 Okl. 135; 140 Pac. 610.

¹⁶ *Young v. Vandergrift*, 30 Pittsb. L. J. (N. S.) 39. Reversed in *Young v. Forest Oil Co.*, 194 Pa. St. 248; 30 Pittsb. L. J. (N. S.) 221; 45 Atl. Rep. 121. See *Ohio Oil Co. v. Hurlbut*, 7 Ohio Dec. 321; 14 Ohio C. C. 144, reversing 6 Ohio Dec. 305; *Henne v. South Penn. Oil Co.*, 52 W. Va. 192; 43 S. E. Rep. 147; *Gadbury v. Ohio, etc., Gas Co.*, 162 Ind. 9; 67 N. E. Rep. 259.

"voidable" at the election of the lessor; and it will be necessary for him to do some act evincing an intention to avoid it before it can be considered avoided or terminated.¹⁷ This is true even though a clause provides that a failure to do the thing covenanted to do "shall render this lease null and void, together with all rights and claims, and not binding on either party and not to be revived without the consent of both parties hereto in writing." "Such provisions of forfeiture," said the court, "are for the benefit of the lessor, and not for the benefit of the lessee. The lessee cannot plead his own default or wrong in discharge of his obligation to drill or pay rental."¹⁸ The lessor has the option to discontinue the lease, on default of the

¹⁷ *Roberts v. Davey*, 4 Barn. and Ad. 664; 1 Nev. and M. 443; *Bryan v. Baneks*, 4 Barn. and Ald. 401; *Bettman v. Harness*, 42 W. Va. 433; 26 S. E. Rep. 271; 36 L. R. A. 566; *Westmoreland, etc., Gas Co. v. DeWitt*, 130 Pa. St. 235; 18 Atl. Rep. 724; 5 L. R. A. 731; *Smith v. Miller*, 49 N. J. L. 521; 13 Atl. Rep. 39; *Henne v. South Penn. Oil Co.*, 52 W. Va. 192; 43 S. E. Rep. 147; *Risch v. Busch*, 175 Ind. 621; 95 N. E. 123; *Millan v. Bartlett*, 69 W. Va. 155; 71 S. E. 13; *Lavery v. Mid-Continent, etc., Co. (Okl.)*, 162 Pac. 737; *Mitchell v. Probst (Okl.)*, 152 Pac. 597; *Caddo Oil & Mining Co. v. Producers Oil Co.*, 134 La. 701; 64 So. 684; *McKean Natural Gas Co. v. Wolcott*, 254 Penn. 323; 98 Atl. 955. See Sec. 863, notes.

Where an oil and gas lease provided for drilling or operating oil or gas wells, and, on failure to do so, to pay an agreed sum per day to the lessor for such failure or delay, and that, on failure to drill, operate, or to pay the agreed sum, the lease should be void, such provision was for the benefit of the lessor, so that, on a breach of the lease, he might declare a forfeiture by proper notice or waive the forfeiture and proceed against the lessee for failure to

perform the covenants of the lease, and hence title did not revert in the lessor immediately on the lessee's default. *Perry v. Acme Oil Co.*, 44 Ind. App. 207; 88 N. E. 859; reversing 80 N. E. Rep. 174; *Brown v. Wilson (Okl.)*, 160 Pac. 94; L. R. A. 1917 B 1184.

¹⁸ *Woodland Oil Co. v. Crawford*, 55 Ohio St. 161; 36 Ohio L. Bull. 231; 44 N. E. Rep. 1093; 34 L. R. A. 62; *Thomas v. Hukill*, 34 W. Va. 385; 12 S. E. Rep. 522; *Jones v. Western, etc., Gas Co.*, 146 Pa. St. 264; 23 Atl. Rep. 386; 29 W. N. C. 266; *Galey v. Kellerman*, 123 Pa. St. 491; 16 Atl. Rep. 474; *Ray v. Western, etc., Gas Co.*, 138 Pa. St. 576; 20 Atl. Rep. 1065; 12 L. R. A. 290; *Springer v. Citizens', etc., Gas Co.*, 145 Pa. St. 430; 22 Atl. Rep. 986; *Cochran v. Pew*, 159 Pa. St. 184; 28 Atl. Rep. 219; *Smiley v. Western, etc., Gas Co.*, 27 W. N. C. 238; *Liggett v. Shira*, 159 Pa. St. 350; 33 W. N. C. 553; 25 Atl. Rep. 218; *Mathews v. People's, etc., Gas Co.*, 179 Pa. St. 165; 39 W. N. C. 544; 27 Pittsb. L. J. (N. S.) 421; 36 Atl. Rep. 216; *Harris v. Ohio Coal Co.*, 57 Ohio St. 118; 48 N. E. Rep. 502; *Indiana Natural Gas Co. v. Gainard*, 45 Ind. App. 613; 91 N. E. Rep. 362; *New Domain Oil &*

lessee, or affirm the continuance of the contract.¹⁹ Where a lease provided that the lessee's failure to complete a well within a certain period, or, in default thereof, to pay a certain yearly rental, should render the lease "null and void," and that all rights and claims should therefrom cease, "with like effect as if this agreement had never been made," it was held that the lessee, by his own default, could not relieve himself from liability already incurred.²⁰ In the instances just given parol evidence is not admissible to show the uniform construction of similar clauses by parties to such leases.²¹ Some of the courts have gone a long ways in upholding the rule that only the lessor can take advantage of the lessee's default. Thus where a lease provided that a lease must be completed within three months, and in case of a failure to do so, to pay a rental of \$25 a month, until the completion of one well; and then expressly

Gas Co. v. Gaffney Oil Co., 134 Ky. 792; 121 S. W. Rep. 699; Hancock v. Diamond Plate Glass Co., 162 Ind. 146; 70 N. E. Rep. 149; Miller v. Logan, 31 Pittsb. Leg. J. (N. S.) 217; Cherokee Const. Co. v. Bishops, 86 Ark. 489; 112 S. W. Rep. 189. § 863, notes.

¹⁹ Wills v. Manufacturers', etc., Gas Co., 130 Pa. St. 222; 18 Atl. Rep. 721; 5 L. R. A. 602; Ogden v. Hatry, 145 Pa. St. 640; 23 Atl. Rep. 334; Phillips v. Vandergrift, 146 Pa. St. 357; 23 Atl. Rep. 347; Leatherman v. Oliver, 151 Pa. St. 646; 31 W. N. C. 205; 25 Atl. Rep. 309; Agerter v. Vandergrift, 138 Pa. St. 576; 27 W. N. C. 230; 21 Atl. Rep. 202.

²⁰ Ogden v. Hatry, *supra*; Shetler v. Hartman, 1 Pennyp. (Pa.) 279; Miller v. Logan, 31 Pittsb. Leg. J. (N. S.) 217; Perly v. Aeme Oil Co., 44 Ind. App. 207; 88 N. E. Rep. 859, reversing 80 N. E. Rep. 174.

²¹ Jones v. Western, etc., Gas Co., 146 Pa. St. 204; 29 W. N. C. 266; 23 Atl. Rep. 386.

Where a clause in a lease reads

"and no right of action shall after such failure accrue to either party on account of the breach of any promise or agreement herein contained," it was held that the words "after such failure" referred to the continued failure to make the payment after it became due, and that the right of action to recover it was not affected. Leatherman v. Oliver, 151 Pa. St. 646; 25 Atl. Rep. 309; 31 W. N. C. 205; Conger v. National, etc., Co., 165 Pa. St. 561; 31 Atl. Rep. 1038; Sanders v. Sharp 153 Pa. St. 555; 25 Atl. Rep. 524. Schaupp v. Hukill, 34 W. Va. 375; 12 S. E. 501; Hukill v. Myers, 36 W. Va. 639; 15 S. E. 151; Lowther Oil Co. v. Guffey, 52 W. Va. 88; 42 S. E. 101; 97 Am. St. 1027; Stone v. Marshall Oil Co., 188 Pa. 602; 41 Atl. 748, 1119; 65 L. R. A. 216; Bartley v. Phillips, 165 Pa. 325; 30 Atl. 842. The lessee cannot insist that the lessor exercise his right of option in order that he, the lessee, be released from his covenant. Leatherman v. Oliver, 151 Pa. St. 646; 25 Atl. Rep. 309; Liggitt v. Shira, 159 Pa. 350; 28 Atl. 218.

provided that "a failure to complete such a well or to comply with any of the foregoing conditions, or to make any such payments within such time and at such place as above mentioned, renders this lease absolutely null and void, and no longer binding on either party, and will reinvest the estate herein granted in the lessor, and release the lessee from all his covenants herein contained, he having the option to drill said well or not, or pay said rental or not as he may elect;" this clause was considered not to give the lessee a right to avoid the lease; and he not having drilled a well could not set up a forfeiture to avoid paying rent.²² In discussing a case of this kind the Supreme Court of Pennsylvania used the following language:

"Whilst the obligation on the part of the lessee to operate is not expressed in so many words, it arises by necessary implication. . . . If a farm is leased for farming purposes, the lessee to deliver to the lessor a share of the crops, in the nature of rent, it would be absurd to say, because there was no express engagement to farm, that the lessee was under no obligation to cultivate the land; an engagement to farm in a proper manner, and to a reasonable extent, is necessarily implied. The clear purpose of the parties to this lease was to have the lands developed, and the half-yearly payments, and the other sums stipulated, were intended not only to spur the operator, but to compensate Ray for the operator's delay or default. The lessor's hands have been tied for two years. We do not know that he lost anything in royalties, or that he suffered by drainage, for the territory might have proved unproductive; but, as the transaction was founded in the hope that either gas

²² *McMillan v. Philadelphia Co.*, 159 Pa. St. 142; 28 Atl. Rep. 220. See also *Matthews v. People's Natural Gas Co.*, 179 Pa. St. 165; 36 Atl. Rep. 216; and *Bartley v. Phillips*, 179 Pa. St. 175; 36 Atl. Rep. 217. The lease in *Coelran v. Pew*, 159 Pa. St. 184; 28 Atl. Rep. 219; was almost as strong in the language used, and a like result was reached by the court.

A lease for five years provided that a well should be completed within a year, or the lessee pay an

annual rental until he did so. If the lessee failed to make any of the payments within ten days after the time specified, the lease should be void, and neither lessor nor lessee, after such failure, should have a right of action by reason of the breach. It was held that the failure of the lessee to make such payments did not relieve him of liability for the rent, nor prevent the lessor from maintaining an action for it. *Conger v. National, etc., Co.*, 165 Pa. St. 561; 30 Atl. Rep. 1038.

or oil, or both, might be found in paying quantities, it was competent for the parties to contract in advance for the amount of compensation to which, in the event of delay or default in development, the lessor would be entitled. The provision for forfeiture was doubtless inserted in anticipation that the lessee might make default and become unable to pay, in which event he might put an end to the lessee's pretensions and seek other means of development. This clause having been inserted as a protection to the lessor, he had the right either to declare the forfeiture or to affirm the continuance of the contract; and, if the lessor did not choose to avail himself of the forfeiture, the lessee cannot set it up as a defense to an action in affirmance of the contract.²³ So where a contract between a landowner and a corporation gave the latter the exclusive right of drilling a gas well on certain property, and provided that until that was done, it should pay \$20 a year for the exclusive privilege, and that the contract should be deemed terminated whenever it should fail to pay the rental price within sixty days after it became due, it was held that a failure to pay the rent did not terminate the contract, but merely gave the landowner the right to do so.^{23a}

**§ 176. Heirs or assignees of lessor may declare forfeiture.—
Assignee.**

The lessor or his heirs may declare a forfeiture and make a re-entry.²⁴ So the devisee may declare a forfeiture and re-enter.²⁵ So may the lessor's assignees.²⁶ Where one, who was of age, of several children, all minors but he, and heirs of a

²³ Ray v. Natural Gas Co., 138 Pa. St. 576; 20 Atl. Rep. 1065; 12 L. R. A. 290.

^{23a} Hancock v. Diamond Plate Glass Co., 162 Ind. 146; 70 N. E. Rep. 149.

The lessor may cancel the lease because of a forfeiture or collect rents until the premises are reconveyed to him or until the term of the lease expires. McKean v. Grim (Okl.), 157 Pac. 308; McKean Natural Gas Co. v. Wolcott, 254 Penn. 323; 98 Atl. 955.

²⁴ Island Coal Co. v. Combs, 152

Ind. 379; 53 N. E. Rep. 452; Wilson v. Goldstein, 152 Pa. St. 524; 25 Atl. Rep. 493.

If the lease be indivisible the heirs, after disposing of a part of the land, cannot alone maintain an action for annulment of the lease. Cochran v. Gulf, etc., Co., 139 La. 1010; 72 So. 718.

²⁵ Hayden v. Stoughton, 5 Pick. 528; Austin v. Cambridgeport, 21 Pick. 215.

²⁶ Island Coal Co. v. Combs, 152 Ind. 379; 53 N. E. Rep. 452.

deceased lessor, acting on behalf of all declared a forfeiture, the court said it would permit a repudiation of the declaration of a forfeiture, unless it be shown that it was for the benefit of such minors to enforce it rather than keep the lease alive.²⁷ And where the lessors were an adult and also a guardian of a minor, the latter alone was not permitted to declare a forfeiture.²⁸ These two last cases cover the statement that if there be several lessors, as joint or tenants in common of the same tract, a forfeiture cannot be declared and enforced, unless all join in the declaration. Where a conditional fee is conveyed, only the grantor or his heirs can take advantage of a breach of the condition, not even the assignee of the grantor can do so.²⁹

§ 177. Stranger cannot avail himself of forfeiture.

As only the lessor can avail himself of the right to declare a forfeiture, a mere stranger cannot set up, in order to defeat him in his rights, that the lessee has forfeited his right to the lease, so long as the lessor has not entered for or declared a forfeiture.^{29a} Thus in an action of ejectment brought by the lessee of a lease against a mere squatter, where such lessee had established a prima facie case, it was held that the squatter could not avail himself of the lessee's want of diligence in prosecuting the work, as required by the lease, and insist that the premises had been abandoned.³⁰ So where a landowner executed a lease on his farm, and at the same time he entered into a contract with the lessee to give him an option to purchase, within a stated time, certain completed wells on the land and the machinery and tools upon it; and the existence of this contract was in dispute, but in any event it was not

²⁷ *Wilson v. Goldstein, supra.*

²⁸ *Springer v. Citizens' Gas Co.*, 145 Pa. St. 430; 22 Atl. Rep. 986.

²⁹ *Upington v. Corringan*, 151 N. Y. 143; 45 N. E. Rep. 359.

^{29a} *New Domain Oil & Gas Co. v. Gaffrey Oil Co.*, 134 Ky. 792; 121 S. W. Rep. 699; 34 Ky. L. Rep.

Where a plaintiff sued the defendant to prevent an interfering with his possession of oil lands, it was held that he was not entitled

to show that the defendant, who had a lease from the owner, had forfeited his right, that being a matter concerning the owner of the land alone. *Moore v. Decker* (Tex. Civ. App.), 176 S. W. 816.

³⁰ *Bartley v. Phillips*, 165 Pa. St. 325; 36 W. N. C. 19; 30 Atl. Rep. 842; *Germania Refining Co. v. Alum Rock Co.*, 226 Pa. 433; 75 Atl. Rep. 715; *Doddridge County Oil & Gas Co. v. Smith*, 154 Fed. Rep. 970.

assigned to the plaintiff; and the lease required the lessee to drill a well within four months, and another within the succeeding four months; and the complainant drilled the first, using, with the landowner's consent, his machinery and tools and some of his material; and while the second well was being drilled for complainant by a contractor using this machinery and these tools, the alleged option expired, and the landowner appeared and demanded of the contractor payment of the stipulated price, or that he cease work, in consequence of which the contractor stopped work, and the time for the completion of the work expired before it could be finished, and the landowner took possession of the wells and complainant's property it was held that the complainant had nothing to do with the option contract, and that its expiration afforded no justification for the action of the landowner in stopping the work.^{30a} If the lessor sell a part of the leased premises, he cannot enforce a forfeiture as to the part sold.^{30b}

§ 178. Lease may be voidable at election of lessee on his default.

A lease may, however, be so drawn that a lessee may take advantage of his own default. "Parties may agree that," said the Supreme Court of Ohio, "in case of failure to drill, or failure to pay, or both, the lessee shall be relieved of his obligation upon such terms as the parties may agree upon in the lease, whether the terms be of value to the lessor or inconvenience to the lessee; but a naked default and non-performance, as in this lease, cannot be held to discharge the obligation of the lessee."³⁰ If the lessee may take advantage of his own default, he must sur-

^{30a} *Doddridge County Oil & Gas Co. v. Smith*, 154 Fed. 970. See also *Germania Refining Co. v. Alum Rock Gas Co.*, 226 Pa. 433; 75 Atl. Rep. 715.

^{30b} *Brewster v. Lanyon Zinc Co.*, 140 Fed. Rep. 801; 62 C. C. A. 213; *Cochran v. Gulf, etc., Co.*, 139 La. 1010; 72 So. 718.

³⁰ *Woodland Oil Co. v. Crawford*, 55 Ohio St. 161; 36 Ohio L. Bull. 231; 44 N. E. Rep. 1093; 34 L. R. A. 62; *Van Voorhis v. Oliver*, 22 Pittsb. L. J. (N. S.) 114; *Van*

Etten v. Kelley, 66 Ohio St. 605; 64 N. E. 560; *Snodgrass v. South Penn. Oil Co.*, 47 W. Va. 509; 35 S. E. 820; *Smith v. South Penn. Oil Co.*, 59 W. Va. 204; 53 S. E. 152; *Jennings-Heywood Oil Syndicate v. Houssierre-Latreille Oil Co.*, 119 La. 864; 44 So. 481; *Houssierre-Latreille Oil Co. v. Jennings-Heywood Oil Syndicate*, 115 La. 107; 38 So. 932; *Gillespie v. Fulton Oil & Gas Co.*, 236 Ill. 188; 86 N. E. 219.

render the lease if he would escape liability.³¹ Where a lease provided that "the lessee shall complete a well within six months from the date hereof or in default thereof pay to the party of the first part, for further delay, an annual rental of seven hundred dollars in advance on the said premises, from the time above specified until such well shall be completed, . . . and a failure to complete said well or pay said rental for ten days after the time above specified for so doing, shall render the agreement null and void, and it can only be renewed by mutual consent; and no right of action shall accrue after such failure to either party on account of the breach of any promise or agreement herein contained," it was held that the lessee had an option to drill a well within six months from the date of the lease and by paying seven hundred dollars within ten days thereafter, a further option for one year; and that the lessee, having a mere option, could set up his own default, availing himself of the elective right secured to him in his contract.³² If the terms of the lease expressly provide that the lease shall be voidable, at the option of either party, or the lessee; then the latter may unquestionably avoid liability by neglecting to comply with its requirements.³³ Where a lease provided that the lessee was to pay a bonus of one hundred dollars, and a royalty of one-eighth part of the oil produced; that it was to continue five years, and as much longer as gas or oil was found in paying quantities; if gas were found, then three hundred dollars rental per year for each well; and there was a proviso that "this lease shall become null and void, and all rights hereunder shall cease and determine, unless a well shall be completed on the premises within one month from the date hereof, or unless the lessee shall pay at the rate of one hundred dollars

³¹ *Roberts v. Bettman*, 45 W. Va. 143; 30 S. E. Rep. 95; *Johnstown, etc., R. R. Co. v. Egbert*, 152 Pa. St. 53; 25 Atl. Rep. 151; *Coulter v. Conemaugh Co.*, 30 Pittsb. L. J. (N. S.) 281.

³² *Van Voorhis v. Oliver*, *supra*. See *Ray v. Natural Gas Co.*, 138 Pa. St. 576; 20 Atl. Rep. 1065; 12 L. R. A. 290; *Glasgow v. Griffith*, 22 Pittsb. L. J. (N. S.) 181; *Ramsey v. White*, 21 Pittsb. L. J. (N. S.) 425;

Lowther Oil Co. v. Guffey, 52 W. Va. 88; 43 S. E. 101; *Great Western Oil Co. v. Carpenter*, 43 Tex. Civ. App. 229; 95 S. W. 57; *Vendocia Oil, etc., Co. v. Robinson*, 71 Ohio St. 302; 73 N. E. 222; 104 Am. St. 773.

³³ *Coehran v. Pew*, 159 Pa. St. 184; 28 Atl. Rep. 219; *Liggett v. Shira*, 159 Pa. 350; 28 Atl. Rep. 218.

monthly in advance for each additional month"—it was held that the lease contained no covenant binding upon the lessee to pay rent, the only penalty imposed upon him being a forfeiture of his rights under the agreement. "But the payment," said the court, "was means provided by the contract by which the exercise of the right of the lessor to assert a forfeiture could be postponed. If the lessee did not wish to postpone the exercise of such right, he had only to refrain from making the payment."³⁴ Where an oil lease was given for a certain period, providing that it should become void and the rights of the lessee under it should cease unless a well should be completed on the premises within a certain period of time, or unless the lessee should pay a certain sum for each year the completion of the well should be delayed; it was held that the terms of the lease did not require the lessee to develop the land or pay the rent, the only penalty for such a failure being a forfeiture of his rights under it.³⁵ The lessor may even, by contract, preclude himself from declaring a forfeiture and give the exclusive right to do so to the lessee, or give him the right to reconvey the premises at his pleasure. Thus a gas lease giving the lessee the right to determine it by reconveying, and making the lease void for a refusal by him to pay the stipulated rentals, is not voidable at the option of the lessor, since such contracts are not designed to convey a present interest in the land, nor is it governed by the statutes relative to landlord and tenant.^{35a}

§ 179. Lessee cannot insist on forfeiture to escape rent.

A lessee cannot insist that he is not liable because the lessor had the right to declare a forfeiture, and that there were conditions authorizing him to declare forfeiture many years

³⁴ *Glasgow v. Chartiers Oil Co.*, 152 Pa. St. 48; 25 Atl. Rep. 232. "This case is not ruled," said the court, "by *Ray vs. The Natural Gas Co.*, 138 Pa. St. 576 [20 Atl. Rep. 1065, 12 L. R. A. 290], and kindred cases." See *Miller v. Balfour*, 138 Pa. St. 183; 22 Atl. Rep. 86.

³⁵ *McKee v. Colwell*, 7 Pa. Super. Ct. 607; *Snodgrass v. South, etc., Oil Co.*, 47 W. Va. 509; 35 S. E. Rep. 820.

In New Jersey, by 1 Gen. St., p. 880, Secs. 135 and 136, the defaulting lessee has the same right to declare a forfeiture as the lessor has. *Boys v. Robinson* (N. J. L.), 38 Atl. Rep. 813.

^{35a} *New American Oil, etc., Co. v. Troyer*, 166 Ind. 402; 76 N. E. Rep. 253; 77 N. E. Rep. 739. See also *Jones v. Mount*, 166 Ind. 570; 77 N. E. Rep. 1089; 74 N. E. Rep. 1032.

before, in order to escape the payment of rent. In such an instance it remains with the lessor to determine whether he will declare a forfeiture or insist upon the rent.³⁶

§ 180. Forfeiture clause omitted.

Where no forfeiture clause is inserted in a lease, either for failure to pay rent or develop the premises; and neither is done, there can be no forfeiture declared. But the failure to pay rent according to the terms of the lease, or to develop the premises, may be considered as sufficient evidence, if unexplained, to support the charge of abandonment.³⁷ And the usual rule is that a lease must state the condition upon which a forfeiture can be declared, or no forfeiture can be declared.³⁸ But where

³⁶ *Ahrns v. Chartiers Valley Gas Co.*, 188 Pa. St. 249; 41 Atl. Rep. 739. See *Bettman v. Shadle*, 22 Ind. App. 542; 53 N. E. Rep. 662; *Hancock v. Diamond Plate Glass Co.*, 162 Ind. 146; 70 N. E. Rep. 149; *Perry v. Acme Oil Co.*, 44 Ind. App. 207; 88 N. E. Rep. 859; *Miller v. Logan*, 31 Pittsb. Leg. J. (N. S.) 217; *Brown v. Wilson (Okl.)*, 160 Pac. 94; *L. R. A. 1917 B 1184*; *Lamar v. Farmer (Ind. App.)*, 109 N. E. 791; *McKean Natural Gas Co. v. Wolcott*, 254 Penn. 323; 98 Atl. 955.

Where a drilling contract by the terms of which an oil company, in consideration of the assignment to it of a one-half interest in an oil and gas lease, specifically undertook to commence and with diligence drill a well on the premises into a designated sand, contained a clause providing that the failure to commence and complete such well should work a forfeiture and render the contract null and void, held, that such provision was for the benefit of the owner of the leasehold interest, and gave to him alone the option to declare a forfeiture

upon failure of the company to discharge its obligation to drill, and that the company could not by virtue of such forfeiture clause, without the consent of such owner, terminate the contract by its own default, and thus escape liability for resultant damages. *Lavery v. Mid-Continent Oil Development Co. (Okl.)*, 162 Pac. Rep. 736.

³⁷ *Marshall v. Forest Oil Co.*, 198 Pa. St. 83; 47 Atl. Rep. 927. § 872.

³⁸ *Vandevoort v. Dewey*, 42 Hun 68.

An oil and gas lease providing that the lessee shall begin drilling within 8 months, otherwise the lease to be void, and that if no oil or gas well be drilled within 12 months the lessee may pay a certain sum per acre annually, and that the lease shall be binding as long as gas shall be furnished the lessor's residence, and if wells are sunk royalty shall be paid, otherwise the lease shall be null and void, as no reference was made to forfeiture as a penalty for failure to pay the royalties, default in such payment was not ground for forfeiture. *Davis v. Chautauqua Oil & Gas Co.*, 78

the lease was limited to twelve months or so long as gas should be found, for a certain royalty, and pay blank dollars per blank time (the blanks not being filled); it was held that a forfeiture could be declared.³⁹ If the lease contain an express condition concerning the lessor's right to declare a forfeiture because of delay in drilling the first well, no covenant authorizing a forfeiture because of such delay can be implied in direct opposition to the written provision.^{39a}

§ 181. Implied covenants do not authorize forfeiture.

There can be no forfeiture for a violation of an implied covenant, unless the lease expressly so provides.*³⁹ "A breach of the implied covenant to reasonably develop and protect lines does not have the effect to forfeit the lease in whole or in part, nor is it good cause for a court to declare such forfeiture, unless the lease in express terms provides that a breach of such implied covenant shall avoid or forfeit the lease." "It is strongly urged that it is inequitable for the lessee to hold on to his lease, and still fail so to operate the premises as to produce reasonable results, and that he should either reasonably operate the prem-

Kan. 97; 96 P. 47; *Poe v. Ulrey*, 233 Ill. 56; 89 N. E. Rep. 46.

³⁹ *Eaton v. Allegany Gas Co.*, 122 N. Y. 416; 25 N. E. Rep. 981, reversing 42 Hun 61. See also *Barnsdall v. Boley*, 119 Fed. Rep. 191.

^{39a} *Kachelmacher v. Laird*, 92 Ohio St. 324; 110 N. E. 933.

As a general rule a lease must state the conditions upon which a forfeiture can be declared, or none can be. *Smith v. Peoples Nat. Gas Co.*, 101 Pa. 739; *Vandevoort v. Dewey*, 42 Hun 68.

*³⁹ *Poe v. Ulrey*, 233 Ill. 56; 84 N. E. Rep. 46; *Davis v. Chautauqua Oil & Gas Co.*, 78 Kan. 97; 96 Pac. Rep. 47; *Rose v. Lanyon Zinc Co.*, 68 Kan. 126; 76 Pac. Rep. 625; *Carr v. Huntington, etc., Co.*, 33 Ind. App. 1; 70 N. E. Rep. 552; *Thompson v. Cristy*, 138 Pa. 220; 20 Atl. 934; *McClendon v. Busch-Everett*

Co., 138 La. 722; 70 So. 781. See *Indiana Oil, etc., Co. v. McCrory*, 42 Okl. 136; 140 Pac. 610.

In a lease the covenants of the lessee were introduced with the statement that the grant is on the following terms, followed by a stipulation that the lessee's failure to comply with any of the conditions should render the lease void. It was held that the stipulation had reference to the legal effect of what preceded, and if that, by necessary implication, contained a covenant by the lessee to exercise reasonable diligence in prosecuting the development, the covenant was also a condition, a substantial breach of which entitled the lessor to avoid the lease. *Brewster v. Lanyon Zinc Co.*, 140 Fed. Rep. 801; 72 C. C. A. 210.

ises or get off and permit his lease to be forfeited. The answer is that, while there is an implied covenant to reasonably operate the premises, there is no implied or express covenant to get off and forfeit his lease for a breach of such covenant. The lease in question provides for a forfeiture for the failure to comply with the conditions, or to pay the cash consideration in the lease mentioned, at the time and in the manner agreed; but the implied covenant, to reasonably operate the premises, is not mentioned in the lease, and is therefore not included in the causes of forfeiture. Some causes of forfeiture being expressly mentioned, none other can be implied.⁴⁰ A number of cases hold, however, that a breach of an implied covenant is sufficient to justify the declaration of a forfeiture;⁴¹ and a lessee may lose his rights by abandonment, although no forfeiture clause is in the lease.^{41a} Where a gas and oil lease provided for a forfeiture in case a test well was not completed on a certain block of leases by a certain date, and also provided for

⁴⁰ *Harris v. Ohio Oil Co.*, 57 Ohio St. 118; 48 N. E. Rep. 502; 1 Ohio N. P. 132; 38 Wkly. L. Bull. 283; *McKnight v. Kreutz*, 51 Pa. St. 232; *Core v. N. Y., etc., Co.*, 52 W. Va. 276; 43 S. E. Rep. 128. The remedy of the lessor was considered to be a suit for damages.

There can be no cancellation if the lessee has done all he expressly agreed to do. *Cochran v. Gulf, etc., Co.*, 139 La. 1010; 72 So. 718.

⁴¹ *King v. Edwards*, 32 Ill. App. 558; *Conrad v. Morehead*, 89 N. C. 31; *Maxwell v. Todd*, 112 N. C. 677; 16 S. E. Rep. 926; *Hawkins v. Pepper*, 117 N. C. 407; 23 S. E. Rep. 434; *Barnsdall v. Boley*, 119 Fed. Rep. 191; *Eaton v. Allegany Gas Co.*, 122 N. Y. 416; 25 N. E. Rep. 981, reversing 42 Hun 61. See *Coffinberry v. Sun Oil Co.*, 67 N. E. Rep. 1069; *Steelsmith v. Gartlan*, 45 W. Va. 27; 29 S. E. 978; 44 L. R. A. 107; *Kleppner v. Lemon*, 176 Pa. 502; 35 Atl. 109; *Kellar v. Craig*, 126 Fed. 630; 61 C. C. A. 366.

It has been held that equity will decree a forfeiture for breach of an implied covenant to diligently operate and develop the leased property, where the particular circumstances show a forfeiture will effectuate justice. *Indiana Oil, etc., Co. v. McCrory*, 42 Okl. 136; 140 Pac. 510.

"The obligation to explore is such an essential part of the contract, though implied, as must be treated as a contract which, if not performed within a reasonable time, entitled the appellee to claim a forfeiture under the agreement that, 'in default of complete compliance on the part of the second party, or his assigns, renders the lease null and void.'" *Consumers' Gas Trust Co. v. Littler*, 162 Ind. 320; 70 N. E. Rep. 363; *Gadbury v. Ohio, etc., Gas Co.*, 162 Ind. 9; 67 N. E. 259; 62 L. R. A. 895.

^{41a} *Smith v. Root*, 66 W. Va. 633; 66 S. E. Rep. 1005; 30 L. R. A. (N. S.) 176.

payment of a stipulated rental in case of failure to complete a test well on the premises covered by the lease within twelve months, grounds of forfeiture not stipulated for would not be implied, as the one ground of forfeiture stated in the lease would imply an exclusion of other grounds, and the agreement for the rental excluded a forfeiture not stipulated for.^{41b} A lease of oil and gas on certain lands will not be forfeited for breach of an implied covenant to drill wells on the land covered by the lease, where there was no means by which the product of wells which might be drilled on the land could be marketed; the remedy of the lessor in such case not being a forfeiture of the lease, but an action for damages.^{41c}

§ 182. Notice of election to declare forfeiture.(a)

If the lessor be in possession, notice to the lessee of his intention to declare a forfeiture is not necessary, unless the lease provide for it; and if a notice is necessary, the execution of a second lease, to the knowledge of the first lessee, is a sufficient notice to him.⁴² A conveyance of the property in fee, by the lessor, after default made, is also a sufficient notice to the lessee, if one be required.⁴³ But if there has been a substantial performance, or a *bona fide* attempt at it, even though a forfeiture could have been enforced by making a demand and giving notice, the putting of another tenant on the premises, without such demand and notice, will not enable the lessor to have a forfeiture declared.⁴⁴ If the lessor give a lessee not in actual

^{41b} *Poe v. Ulrey*, 233 Ill. 56; 84 N. E. Rep. 46; *Kaechelmacher v. Laird*, 92 Ohio St. 324; 110 N. E. 933.

^{41c} *Poe v. Ulrey*, *supra*.

(a) See § 209.

⁴² *Allegheny Oil Co. v. Bradford Oil Co.*, 21 Hun 26, affirmed 86 N. Y. 638; *Gadbury v. Ohio, etc., Gas Co.*, 162 Ind. 9; 67 N. E. Rep. 259; 62 L. R. A. 895; *Gadbury v. Ohio, etc., Gas Co. (Ind. App.)*, 65 N. E. Rep. 289.

Where a lease provides for a notice of forfeiture, there can be no

forfeiture until the notice is given. *Young v. Scott*, 86 Kans. 296; 119 Pac. 873.

In the absence of any provision, therefore, in the lease, which is only an option, the lessor is not required to give notice of his intention to cancel it for non-payment of the sum agreed to be paid for such option. *Mitchel v. Probst (Okl.)*, 152 Pac. 597.

⁴³ *Shepher v. McCalmont Oil Co.*, 38 Hun 37.

⁴⁴ *Kreutz v. McKnight*, 53 Pa. St. 319.

possession notice that the lease is forfeited, it is substantially a declaration that he will refuse to put him in possession.⁴⁵ Where a lease provided that if there was a delay in developing the premises, after written notice by the lessee of a forfeiture, the lessee should have the right to pay an annual rent because of such delay, it was held that the execution of a second lease conditioned on the avoidance of the first, was not such a written notice as the lease required.⁴⁶ If the lessor has demanded excessive royalties, then his notice of a forfeiture is a nullity.⁴⁷ If he has such possession as entitles him to resist the entry by the lessee after a forfeiture, no notice of a forfeiture is necessary.⁴⁸ If the lessor desires to declare a forfeiture of the lease for the reason that the land has not been fully developed, although the lessee has entered and developed a part of it, he must give notice to such lessee of his intention to declare a forfeiture if the lease is not fully developed, and reasonable time must be given for the development.⁴⁹ But if a lease provide that it shall be subject to forfeiture on default of the lessee, and authorizes the lessor to take possession "without any notice or legal process," notice is not necessary.⁵⁰ So where the condition in a lease was that if no well should be completed within a year from the date of the lease, it should be void, unless the lessee pay a certain named sum of money annually during the time the well remained uncompleted, it was held that a failure

⁴⁵ *Carnegie, etc., Gas Co. v. Philadelphia Co.*, 158 Pa. St. 317; 27 Atl. Rep. 951.

⁴⁶ *South Penn. Oil Co. v. Stone* (Tenn. Ch.), 57 S. W. Rep. 374.

⁴⁷ *West Ridge Coal Co. v. Van Storch*, 5 Lack. Leg. N. 189.

⁴⁸ *Maxwell v. Todd*, 112 N. C. 677; 16 S. E. Rep. 926.

⁴⁹ *Ohio Oil Co. v. Hurlbut*, 7 Ohio Dec. 321; 14 Ohio C. C. Rep. 144; reversing 6 Ohio Dec. 305. See *Coffinberry v. Sun Oil Co.*, 67 N. E. Rep. 1069; *Pittinger v. Ramage*, 40 Ind. App. 486; 82 N. E. Rep. 478; *Carr v. Huntington Light & Fuel Co.*, 33 Ind. App. 1; 70 N. E. Rep. 552; *Campbell v. Rock Oil Co.*, 151 Fed. Rep. 191; 80 C. C. A. 467;

Lafayette Gas Co. v. Kelsey, 164 Ind. 563; 74 N. E. Rep. 7; *Deihl v. Ohio Oil Co.*, 30 Ohio Cir. Ct. Rep. 750; *New American Oil & Mining Co. v. Troyer*, 166 Ind. 402; 76 N. E. Rep. 253; *New American Oil & Mining Co. v. Wolff*, 166 Ind. 402; 76 N. E. Rep. 255; *Indiana Natural Gas & Oil Co. v. Beales*, 166 Ind. 684; 76 N. E. Rep. 520; *Consumers' Gas Trust Co. v. Ink*, 163 Ind. 174; 71 N. E. Rep. 477; *Consumers' Gas Trust Co. v. Worth*, 163 Ind. 141; 71 N. E. Rep. 489; *Monarch Oil, etc., Co. v. Richardson*, 124 Ky. 602; 99 S. W. Rep. 668; 30 Ky. L. Rep. 824.

⁵⁰ *Fisher v. Dunring*, 53 Mo. App. 548.

to complete the well during the year, and an omission to pay the first annual amount, avoided the lease, without an election on the part of the owner to terminate it.⁵¹ If there be two lessees, and one is a non-resident, the notice to the resident lessee is sufficient.^{51a} A refusal on the part of the lessor to accept rent of the lessee is a sufficient notice of an intention to terminate the lease.^{51b} But an unwarranted declaration of a forfeiture is not notice of an intention to declare a forfeiture.^{51c} If the lessor is to receive "free gas," then he need not notify the lessee to shut off the gas, the notice of an intention to terminate the lease being sufficient.^{51c} A premature declaration of a forfeiture is not equivalent of an intention to declare a forfeiture.^{51d} So notice that a lease has expired is not the equivalent of a notice that it would be declared forfeited.^{51e} Notice of forfeiture given to the former manager of the assignee of the leased premises after the lease has passed into the hands of a receiver is unavailing.^{51f}

§ 183. Waiver of forfeiture.(a)

The right of a lessor to declare a forfeiture and re-enter on the leased premises because of that fact may be waived by him, and often is, either by express statements, or by conduct or by acts.⁵² A waiver of the time, however, within which operations are to be commenced is not necessarily a waiver of the time for completion of a well.⁵³ In the case just cited the operations

⁵¹ *Kenton Gas, etc., Co. v. Dorney*, 17 Ohio Cir. Ct. Rep. 101; 9 Ohio Cir. Dec. 604.

^{51a} *Flanagan v. Marsh* (Ky.), 105 S. W. Rep. 424; 32 Ky. L. Rep. 184.

^{51b} *Logansport & W. V. Gas Co. v. Seegar*, 165 Ind. 1; 74 N. E. Rep. 500; *Consumers' Gas Trust Co. v. Ink*, 163 Ind. 174; 71 N. E. Rep. 477; *Consumers' Gas Trust Co. v. Worth*, 163 Ind. 141; 71 N. E. Rep. 489.

^{51c} *Miller v. Vandergrift*, 30 Ohio Cir. Ct. Rep. 730.

^{51d} *Consumers' Gas Trust Co. v. Ink*, 163 Ind. 174; 71 N. E. Rep. 477.

^{51e} *Indiana Natural Gas & Oil Co. v. Beales*, 166 Ind. 684; 76 N. E. Rep. 520.

^{51f} *Young v. Scott*, 86 Kan. 296; 119 Pac. 873.

(a) §§ 891, 903.

⁵² *McCarty v. Mellon*, 5 Pa. Dist. Rep. 425; *Friend v. Mallory*, 52 W. Va. 53; 43 S. E. Rep. 114; *Lloyd v. Campbell*, 186 Ill. App. 566; *Indiana Oil, etc., Co. v. McCrory*, 42 Okl. 136; 140 Pac. 610. Acceptance of rent after forfeiture declared. Sec. 863, note 24.

⁵³ *Cleminger v. Baden Gas Co.*, 159 Pa. St. 16; 28 Atl. Rep. 293.

were to begin within sixty days, and a well to be completed within five months, and in either event the lease was to be forfeited. The lessor waived the sixty day provision; but this was held not a waiver of the five months' provision, even though the lease was assigned after the sixty day period. But if there has been such delay as entitles the lessor to declare a forfeiture, and without doing so, he permit the lessee to commence operations and sink wells on the land with his consent, he waives his right to insist on a forfeiture.⁵⁴ Even though the lease has expired, yet if the lessor permit the lessee to expend large sums of money in its development, thus leading the lessee to believe that it was not his intention to claim a forfeiture, he cannot then declare a forfeiture.⁵⁵ Mere silence, however, on the part of the lessor during the time given for the development of the premises will not be a waiver of the right to declare a forfeiture.⁵⁶ But delay in completing a well within time, with the

⁵⁴ *Ohio Oil Co. v. Hurlbut*, 14 Ohio Cir. Ct. Rep. 144; 7 Ohio Dec. 321, reversing 6 Ohio Dec. 305; *Hornet v. Singer*, 35 Pa. Super. Ct. Rep. 491; *Pyle v. Henderson*, 65 W. Va. 39; 63 S. E. Rep. 762 (a waiver of payment of rent for a time because the title was defective); *Duffield v. Hue*, 129 Pa. 94; 18 Atl. 566; *Duntley v. Anderson*, 169 Fed. 391; 94 C. C. A. 647; *Campbell v. Rock Oil Co.*, 151 Fed. 191; 80 C. C. A. 467; *Kansas Nat. Gas Co. v. Harris*, 79 Kan. 167; 100 Pac. 72; *Pendoria Oil, etc., Co. v. Robinson*, 71 Ohio St. 302; 73 N. E. 222; *Hukill v. Myers*, 36 W. Va. 639; 15 S. E. 151; *Monarch Oil, etc., Co. v. Richardson*, 99 S. W. 668; 30 Ky. L. Rep. 824; *Steiner v. Marks*, 172 Pa. 400; 33 Atl. 695.

⁵⁵ *Duffield v. Michaels*, 102 Fed. Rep. 820; 42 C. C. A. 649; *Smith v. South Penn. Co.*, 66 W. Va. 633; 53 S. E. Rep. 152; *Lynch v. Versailles Fuel Gas Co.*, 165 Pa. 518; 30 Atl. 984; *Owens v. Corsicana Petroleum Co. (Tex. Civ. App.)*, 169 S. W. 192.

⁵⁶ *Island Coal Co. v. Combs*, 152 Ind. 379; 53 N. E. Rep. 452; *Adams v. Ore Knob Copper Co.*, 7 Fed. Rep. 634.

A delay of sixteen months after the execution of a lease before suit brought to enforce it does not constitute laches, unless the situation has so changed as to render the enforcement inequitable. *Mexico-Wyoming Petroleum Co. v. Valentine*, 237 Fed. 539.

But a delay of six years in bringing suit for an accounting and to avoid a lease, because obtained by fraudulent representation was held barred by laches where the plaintiff had learned of the fraud soon after the execution of the lease. *Thompson v. Milliken*, 93 Kans. 72; 143 Pac. 430.

Under an oil and gas lease, providing for forfeiture in case of a failure to commence a well within ninety days unless the lessee pay for delay at \$1 per acre per annum, a failure of the lessor to assert his right of forfeiture promptly and unequivocally is a waiver of

assent of the lessor, who is anxious that the work be continued, and by his conduct and acquiescence clearly make it appear that he does not regard the delay as sufficient ground for declaring a forfeiture, is a waiver of the right to declare it.⁵⁷ Where a lease required seven wells to be put down, acquiescence in the failure to put down two or three of the preceding six wells was held a waiver of the right to declare a forfeiture as to the delay made in neglect to drill the seventh well on time.⁵⁸ Where an oil lease did not make time the essence of the contract, and the rent for delay for several years had been regularly paid, and at the time another year's rent fell due, the lessee was daily expending, and for ten days thereafter continued daily to expend, to the knowledge of the lessee, a sum equal to a year and a half's rent under a producing well, when he produced gas in a paying quantity, it was held that the lessee had waived his right to declare a forfeiture, six or seven days after such rent fell due, because of its non-payment at the stipulated time.⁵⁹

that right. *Broom v. Hugh*, 98 Kans. 589; 160 Pac. 1135; *Indiana Oil, etc., Co. v. McCrory*, 42 Okl. 136. See also *Owens v. Corsicana Petroleum Co. (Tex. Civ. App.)*, 169 S. W. 192.

But where money necessary to prevent a forfeiture not deposited to the lessor's credit in time, the fact that he made delay in refusing to accept the deposit, it was held not to estop him from thereafter claiming a forfeiture, the lessee not being prejudiced by the delay. *Witherspoon v. Staley (Tex. Civ. App.)*, 156 S. W. 557. See 863, note 29.

In an instance of a stone lease it was held that a demand for the rent must be made on the premises, where the lease did not specify the place of payment, before notice of forfeiture could be given. *Hornet v. Singer*, 35 Pa. Super Ct. Rep. 491.

⁵⁷ *Elk Fork Oil & Gas Co. v. Jennings*, 84 Fed. Rep. 839; *Riddle*

v. Mellon, 147 Pa. St. 30; 23 Atl. Rep. 241.

The fact that the lessor and lessee entered into an agreement for delay does not deprive the lessor of his right to forfeit the lease for failure to prosecute the work with diligence and in good faith, where the lessee's purpose in procuring the agreement was fraudulent, the lessor not being aware of such purpose at the time of its execution. *J. W. Guffey Petroleum Co. v. Oliver (Tex. Civ. App.)*, 79 S. W. Rep. 884.

⁵⁸ *Duffield v. Hue*, 129 Pa. St. 94; 18 Atl. Rep. 566.

⁵⁹ *Lynch v. Versailles Fuel Gas Co.*, 165 Pa. St. 518; 35 W. N. C. 558; 30 Atl. Rep. 984. See *Monfort v. Lanyon Zinc Co.*, 67 Kan. 310; 72 Pac. Rep. 784.

The lessor must act promptly, and the result of enforcing the forfeiture must not be unconscionable. *Thompson v. Christie*, 138 Pa. St. 230; 20 Atl. Rep. 934; 11 L. R. A.

A delay for a very short time—as a day or so—will not work a forfeiture where the lessor by his acts and declarations has led the lessee into the belief that a forfeiture, because of such delay, would not be enforced.⁶⁰ Where the lessor, after acts sufficient for a forfeiture had taken place, gave a second lease on the premises, but endorsed on it, "This lease is taken subject to" the first lease, it was held that the second lease was not an unequivocal declaration of a forfeiture of the first one, and that the endorsement was such as to enable the lessee to have an erroneous endorsement made on the first lease corrected.⁶¹ Where the acts of the lessor tending to show a waiver are equivocal, the question of waiver is one for the jury.⁶² The lessor may waive the forfeiture, although in possession, affirm the continuance of the lease, and recover the sum agreed to be paid under its terms.⁶³ Where default was unintentionally made in the payment of rental while the lessee was engaged in drilling a second well, and the lessor, with knowledge of the default, suffered him to continue drilling, for some period of time (as, for two weeks), before declaring a forfeiture, and the lessee immediately offered to pay the rental, the court construed the actions of the lessor as an acquiescence in the drilling of the other wells and refused to sustain the declaration of a forfeiture.⁶⁴

236; *McKean Natural Gas Co. v. Wolcott*, 254 Pa. 323; 98 Atl. 955.

⁶⁰ *Steiner v. Marks*, 172 Pa. St. 400; 33 Atl. Rep. 695. See *Cleminger v. Baden Gas Co.*, 159 Pa. St. 16; 28 Atl. Rep. 293.

⁶¹ *Schaupp v. Hukill*, 34 W. Va. 375; 12 S. E. Rep. 501.

Acceptance of acts not called for by the lease as a satisfaction of the terms is a waiver of the right to declare a forfeiture. *Kansas Natural Gas Co. v. Harris*, 79 Kan. 167; 100 Pac. Rep. 72; *Rawlings v. Armel*, 70 Kan. 778; 79 Pac. Rep. 683; *Steiner v. Marks*, 172 Pa. 400; 38 Atl. 695; *Pyle v. Henderson*, 65 W. Va. 39; 63 S. E. 762 (new lease). § 863, note 26.

⁶² *Wesling v. Kroll*, 78 Wis. 636; 47 N. W. Rep. 943; *Nelson v.*

Eachel, 158 Pa. St. 372; 27 Atl. Rep. 1103.

⁶³ *Agerter v. Vandergrift*, 138 Pa. St. 576; 27 W. N. C. 230; 21 Atl. Rep. 202; *Ray v. Gas Co.*, 138 Pa. St. 576; 27 W. N. C. 230; 20 Atl. Rep. 1065; 12 L. R. A. 290; *Jones v. Western, etc., Gas Co.*, 146 Pa. 204; 23 Atl. 386; *Ogden v. Hatry*, 145 Pa. 640; 23 Atl. 334; *Phillips v. Vandergrift*, 146 Pa. 357; 23 Atl. 347; *Perry v. Aeme Oil Co.*, 44 Ind. App. 207; 88 N. E. Rep. 859, reversing 80 N. E. Rep. 174; *Bloom v. Pugh*, 98 Kan. 589; 160 Pac. 1135; *McKean v. Natural Gas Co.*, 254 Pa. 323; 98 Atl. 955.

⁶⁴ *McCarty v. Mellon*, 5 Pa. Dist. Rep. 425; *Hukill v. Myers*, 36 W. Va. 639; 15 S. E. 151; *Pyle v. Henderson*, 65 W. Va. 39; 63 S. E.

Receiving rent after default made will be a waiver of the right to declare a forfeiture for a failure to pay the rent at the time stipulated for its payment in the lease.⁶⁵ If a lease be abandoned, a subsequent parol agreement between the parties to it, whereby the lessee was permitted to enter and resume work upon complying with certain conditions similar to those imposed by the original lease, will not be a waiver of the forfeiture of the lessee's interest under the old lease, but is a new contract.^{65a}

§ 184. Waiver of forfeiture by accepting payment.(a)

An acceptance of rent for the defaulted period or any part of it will usually be a waiver of a right to declare a forfeiture.⁶⁶

762; *New American Oil Co. v. Troyer*, 166 Ind. 402; 76 N. E. 353.

⁶⁵ *Friend v. Mallory*, 52 W. Va. 53; 43 S. E. Rep. 114. § 863, notes 26, 29.

Where, in an action for rent under a lease of oil and gas land, the court on appeal decided that until the lessee took possession the agreement was one from year to year, which at the end of any year either party could terminate, a finding in a subsequent action for rent that the lessee, after having elected to terminate the agreement, furnished gas through its pipes to the lessor, as required by the lease, did not amount to finding of such part performance on the part of the lessee as prevented it from exercising the right to terminate the lease.—*Hancock v. Diamond Plate Glass Co.*, 37 Ind. App. 351; 75 N. E. 659.

^{65a} *Ohio Oil Co. v. Detamore*, 165 Ind. 243; 73 N. E. Rep. 906. See *Kansas Natural Gas Co. v. Harris*, 79 Kan. 167; 100 Pac. Rep. 72; *Lloyd v. Campbell*, 186 Ill. App. 566; *Bloom v. Pugh*, 98 Kans. 589; 160 Pac. 1135; *Brown v. Wilson* (Okl.), 160 Pac. 94; L. R. A. 1917 B 1184.

A lessor who refused to receive quarterly payments under a grant and brought suit to annul the lease on the ground that it was a *Nudum Pactum*, put himself in default, and it was held he could not be heard to urge that the lessee had not, *Pendente Lite*, performed his part of the contract. *Leonard v. Busch-Everett Co.*, 139 La. 1099; 72 So. 748.

A lessor seeking a cancellation after a breach of an implied covenant must come with clean hands and act with reasonable diligence after discovery of his right to the forfeiture. *Indiana Oil, etc., Co. v. McCrory*, 42 Okl. 136; 140 Pac. 610.

By receiving rent for a term, when the rent for a prior term is refused, there is a waiver of the forfeiture, and the lease is continued, even after the date fixed for its expiration. *Smith v. Peoples Nat. Gas Co. (Pa.)*, 101 Atl. 739.

(a) Forfeiture, §§ 863, 903.

⁶⁶ *Davis v. Moss*, 38 Pa. St. 346; *Boys v. Robinson* (N. J. L.), 38 Atl. Rep. 813; *Friend v. Mallory*, 52 W. Va. 53; 43 S. E. Rep. 114; *Monfort v. Lanyon Zinc Co.*, 67 Kan.

When rent was accepted by the lessor, with knowledge on his part that the lessee was every day violating the covenants of the lease, it was held that the lessor accepting rent could not declare a forfeiture without a reasonable prior notice that further non-compliance would not be waived.⁶⁷ Not in all instances, however, will a forfeiture be waived by a receipt of rent. Thus where the amount of the ore sold and delivered could only be ascertained by an examination of the books and accounts of the lessees, the acceptance of a part of the rents or royalties by one of two joint lessors, without any knowledge that a greater sum than that tendered was due, was held not to be a waiver of the forfeiture caused by non-payment of the

310; 72 Pac. Rep. 784; *Indiana Natural Gas Co. v. Beales*, 166 Ind. 684; 76 N. E. Rep. 520; *Consumers' Gas Trust Co. v. Ink*, 163 Ind. 174; 71 N. E. Rep. 477; *Monarch Oil, etc., Co. v. Richardson*, 124 Ky. 602; 99 S. W. Rep. 668; 30 Ky. L. Rep. 824; *Murdock-West Co. v. Logan*, 69 Ohio St. 514; 69 N. E. Rep. 984; *Consumers' Gas Trust Co. v. Worth*, 163 Ind. 141; 71 N. E. Rep. 489; *Consumers' Gas Trust Co. v. Howard*, 163 Ind. 170; 71 N. E. Rep. 493; *Consumers' Gas Trust Co. v. Littler*, 162 Ind. 320; 70 N. E. Rep. 963; *New American Oil & M. Co. v. Troyer*, 166 Ind. 452; 76 N. E. Rep. 353; *New American Oil & M. Co. v. Wolff*, 166 Ind. 402; 76 N. E. Rep. 255; *American Window Glass Co. v. Indiana Natural Gas & Oil Co.*, 37 Ind. App. 439; 76 N. E. Rep. 1006; *Monarch Oil, etc., Co. v. Richardson*, 124 Ky. 602; 99 S. W. Rep. 668; 30 Ky. L. Rep. 824. § 863, notes.

If the rent is payable periodically in advance, an acceptance of rent for such period is a waiver of performance during that period. *Consumers' Gas Trust Co. v. Worth*, 163 Ind. 141; 71 N. E. Rep. 489; *Con-*

sumers' Gas Trust Co. v. Howard, 163 Ind. 170; 71 N. E. Rep. 493; *Consumers' Gas Trust Co. v. Littler*, 162 Ind. 320; 70 N. E. Rep. 363; *New American Oil & M. Co. v. Troyer*, 166 Ind. 402; 76 N. E. Rep. 253; 77 N. E. 739.

An unaccepted tender, after there is a forfeiture, will not serve to keep the lease alive. *Acme Oil & M. Co. v. Williams*, 140 Cal. 681; 74 Pac. Rep. 296.

An acceptance of a part of the royalties due is a waiver. *Headley v. Hoopengartner*, 60 W. Va. 26; 55 S. E. Rep. 744 (received by guardian); *Hays v. Forest Oil Co.*, 213 Pa. 536; 62 Atl. Rep. 1072; *New American Oil & Mining Co. v. Wolff*, 166 Ind. 402; 76 N. E. Rep. 255; *American Window Glass Co. v. Indiana Natural Gas & Oil Co.*, 37 Ind. App. 439; 76 N. E. Rep. 1006.

⁶⁷ *Verdolite Co. v. Richards*, 7 North Co. Rep. (Pa.) 113; *Witherspoon v. Staley* (Tex. Civ. App.), 138 S. W. 1191; *Smith v. South*, 66 W. Va. 633; 53 S. E. Rep. 152; *Lynch v. Versailles Fuel Gas Co.*, 165 Pa. 318; 30 Atl. 984; *Pyle v. Henderson*, 65 W. Va. 39; 63 N. E. 762.

full amount due.⁶⁸ Where a lease required the lessee to drill a well within a certain time, or, in default of its completion within such time, pay ten dollars for every month until its completion—each payment to keep the lease in force for one month only, it was held, the well not having been completed within the required time, that on failure to make the monthly payments required, the lessor had the right to declare the lease forfeited, and that he had not waived his right to declare a forfeiture by accepting payment for the last preceding month, the rental for the previous months being unpaid.⁶⁹ The receipt of rent, after declaring a forfeiture—or, by executing a second lease to a third party—will not be a waiver of the power to declare such forfeiture, contained in the first lease, nor will it reinstate the first lessee in his rights under the lease.⁷⁰ But if periodical rents are to be paid, for which a liability to a forfeiture will be incurred if default be made in the payment of rent for any period; yet, notwithstanding that fact, the lessor frequently accept the rents after the time at which they should have been paid and does not declare a forfeiture, as to justify the lessee in entertaining the belief that he will not be subject to a forfeiture by the act of the lessor if he make a default, he will not, after repeatedly making default in the time of payment, followed by payment to and receipt of rent by the lessor, be subject to a forfeiture for neglect to pay rents on time thereafter, unless the lessor notifies him, before default in the particular instance, that he would insist upon a forfeiture for neglect to pay any rent falling due after giving such notice.⁷¹ Where work is done after default, in payment of rent due, without objection on the part of the lessor, there is a waiver of a right to declare a forfeiture for neglect to pay such rent within the time required.⁷² Agreeing that the time of payment may

⁶⁸ *Boys v. Robinson, supra.*

⁶⁹ *Duffield v. Michaels*, 97 Fed. Rep. 825.

⁷⁰ *Guffey v. Hukill*, 34 W. Va. 49; 11 S. E. Rep. 754. See *Hukill v. Guffey*, 37 W. Va. 425; 16 S. E. Rep. 544.

⁷¹ *Hukill v. Myers*, 36 W. Va. 639; 15 S. E. Rep. 157; *Smith v. South Penn. Oil Co.*, 66 W. Va. 653;

55 S. E. Rep. 152; *Steiner v. Marks*, 172 Pa. 400; 38 Atl. 695; *Pyle v. Henderson*, 65 W. Va. 39; 63 S. E. 762.

⁷² *McCarthy v. Mellon*, 5 Pa. Dist. R. 425.

A consideration paid because of default is a waiver. *Kansas Natural Gas Co. v. Harris*, 79 Kan. 167; 100 Pac. 7. What was not a waiver.

be extended is a waiver of the right to declare a forfeiture for the lack of payment.⁷³ Where the rent is payable in a certain bank by deposit therein, a deposit therein by check of the amount due, on or before the date of payment, is sufficient to prevent a forfeiture.⁷⁴ Waiver of one stipulation in a lease is not a waiver of other independent stipulations.⁷⁵ A lease required a well to be completed within two months, and if not the lease to be void unless the lessee after that time should pay monthly ten dollars for each month's delay in completing a well; and it also required operations on the well to be commenced in thirty days, and if not, ten dollars extra should be paid for the second month; but work was not begun within the first month, nor a well completed within two months and eight days. At the end of the second month, the lessee paid ten dollars; and twelve days after the end of the third he tendered ten dollars more, which was refused. It was held that the first ten dollar payment could not be claimed by the lessor as a payment on account of the money to be paid extra for the second month, and that a lease given to a third party after the end of the third month, and before the well had been completed, under the claim that the first lease had been forfeited by reason of the non-payment of the sum agreed upon to be paid for delay, was void. It was also held that the payments to be made "for each month's delay in completing" the well not being made payable in advance by the terms of the lease, the lessor could not claim a forfeiture five days after the close of the third month, on the

Cleminger v. Baden Gas Co., 159 Pa. 16; 28 Atl. 293.

⁷³ *Wakefield v. Sunday Lake, etc., Co.*, 85 Mich. 605; 49 N. W. Rep. 135.

So acquiescence in delay in commencing work is a waiver of the right to declare a forfeiture because of such delay. *New American Oil Co. v. Troyer*, 166 Ind. 402; 76 N. E. 353; 77 N. E. 739.

⁷⁴ *Friend v. Mallory*, 52 W. Va. 53; 43 S. E. Rep. 114. See *Monfort v. Lanyon Oil Co.*, 67 Kan. 310; 72 Pac. Rep. 784.

Even though the lessor do not draw out the deposit. *Kachelmachten v. Laird*, 92 Ohio St. 324; 110 N. E. 933. But a check drawn by the lessee in favor of the lessor upon a bank where the lessee has no available cash is not a payment. *Brown v. Wilson (Okl.)*, 160 Pac. 94; L. R. A. 1917 B 1184.

⁷⁵ *Murray v. Heinze*, 17 Mont. 353; 42 Pac. Rep. 1057; 43 Pac. Rep. 713; *Brown v. Vandergrift*, 80 Pa. St. 142.

ground that the well was not then completed, and the lessee had failed to make payment for delay for the fourth month.⁷⁶

⁷⁶ *Duffield v. Michaels*, 102 Fed. Rep. 820; 42 C. C. A. 649.

Where a lease provided that if a well was not completed within six months, it could be kept in force by a quarterly payment of \$10 until one was completed; that if at any time after a well was drilled, six months should elapse without any revenue being received from it, and without any further drilling having been done, the lease should be deemed abandoned; an attempt having been made to drill a well which proceeded until 1,000 feet deep, and then the casing was pulled out and the well plugged, and no further drilling done; and more than six months thereafter the lessor brought an action to declare the lessee's rights abandoned, it was held that as the evidence showed the existence of oil in sufficient quantity to warrant shooting, which was not attempted, the court was justified in finding that the operations amounted to the drilling of a well within the meaning of the contract, and that the cessation of operations for six months was an abandonment of the lease; and that the receipt of a quarterly payment after the operations took place, but less than six months thereafter did not commit the lessor to the position that a well had not been drilled, since it was the completion of a well that was to end such payments, and the court was justified in further finding that a well had not been completed within the meaning of the lease. *Federal Betterment Co. v. Bales*, 75 Kan. 69; 88 Pac. Rep. 555.

The lessor cannot sue for the rent due him and also for a cancellation of the lease; he is not entitled to both remedies. *Clemenger v. Flesher* (Tex. Civ. App.), 185 S. W. 304.

A lessor refused to receive quarterly payments under a lease and brought suit to annul the lease on the ground that it was a *Nudum Pactum*. It was held that he put himself in default, and could not be heard to urge that the lessee had not, *pendente lite* performed his part of the contract. *Leonard v. Busch-Everett Co.*, 139 La. 1099; 72 So. 748.

The acceptance of a periodical rent after it is due and when the lessor has a right to declare a forfeiture for non-payment of rent on time, will not preclude the lessor from declaring a forfeiture for a subsequent non-payment of rent, and he may claim a forfeiture because of such non-payment. *Frank Oil Co. v. Belleview Oil & Gas Co.*, 29 Okl. 719; 119 Pac. 260; 43 L. R. A. (N. S.) 487; *Deming Inv. Co. v. Lanham*, 36 Okl. 773; 130 Pac. 260.

Where a mining lease option could have been continued by the payment of \$25.00 on January 28, 1911, a deposit of that amount to the landowners credit in a bank on January 30, was held insufficient, though the receipt for a prior payment erroneously recited that it extended the option to the latter date. *Witherspoon v. Staley* (Tex. Civ. App.), 156 S. W. 557.

§ 185. Waiver of forfeiture by receipt of gas.

Where a lessee was to receive free gas for his use, the use of the gas after forfeiture was held not to be a waiver of the right to declare and insist upon a forfeiture. "The land with the well upon it being the property of the appellee [lessor], he had the right to use the gas from the well without incurring obligation under the contract to the appellant [lessee]." This was an instance where the lessor would have had the right to use the gas after the rights of the lessee were extinguished.^{76a} In another instance in the same court, where the gas was to be taken by the lessee from the general pipe line supplied not only by the well on the lessor's leased lands, but also by wells on other lines, it was held that there could be no forfeiture declared so long as the lessor continued to use the gas.^{76b} This is especially true if his gas comes from the leased premises.^{76c} A service of notice of an intention to declare a forfeiture is sufficient without notice to cut off the gas.^{76d}

§ 186. Acceptance of rent for definite period.—Waiver of right to declare forfeiture.

The acceptance of rent for a definite period prevents the lessor declaring a forfeiture during the period of time covered by the rent. Such is the case where the lessor pays in advance rent for delay in not developing the leased premises. Failure during that period to develop the premises is no cause for the declaration of a forfeiture; and whatever acts or non-performance of the terms of the lease is relied upon must occur or non-performance take place after the period for which rent has been paid has expired. The lessor may give notice to the lessee that at the end of the rental period he will accept no

^{76a} American Window Glass Co. v. Williams, 30 Ind. App. 685; 66 N. E. Rep. 912.

^{76b} King v. Morristown, etc., Co., 31 Ind. App. 476; 68 N. E. Rep. 310; Duntley v. Anderson, 169 Fed. 391; 94 C. C. A. 647.

Equity will refuse to forfeit oil lease at the suit of the lessor because locations for operations were

elsewhere than as prescribed by the lease, where, with knowledge thereof, he accepts without complaint his share of the productions therefrom. Horse Creek Coal Land Co. v. Trees, 75 W. Va. 559; 84 S. E. 376.

^{76c} Duntley v. Anderson, 169 Fed. Rep. 391; 94 C. C. A. 647.

^{76d} Miller v. Vandergrift, 30 Ohio Cir. Ct. Rep. 730.

more rent from him, and will require him to develop the premises. But he must give a reasonable time within which to develop them. Ten days is not enough time.^{76e} After the lessee has complied with his obligation to drill a well, and the lessor has accepted rent or royalty, the latter cannot annul the contract for its failure to stipulate the time within which the lessee should commence drilling.^{76f} A lessor demanding either the rent or a release of the lease, and after not receiving either taking no steps to have it cancelled, cannot be held, as a matter of law, to have elected to cancel the lease.^{76g}

§ 187. Eviction of lessee.

An eviction of the lessee by the lessor will excuse him from carrying out the terms of his lease, and will also prevent a forfeiture of it on his part. The eviction may be purely constructive; such as a conveyance of vacant lots, that have been leased, by the lessor, without any reservation of the lessee's right of entry to drill for oil or gas.⁷⁷ But the entry of a lessor and the construction by him of a building on the land was held not to be such a resumption of possession as will terminate his right thereafter to demand rent, simply because he set his building where the lessee had set a stake to designate the place where the well was to be drilled, the building not otherwise preventing the development of the premises.⁷⁸

^{76e} *New American Oil Co. v. Troyer*, 166 Ind. 402; 76 N. E. Rep. 253; *Vendocia Oil, etc., Co. v. Robinson*, 71 Ohio St. 302; 73 N. E. 222; 104 Am. St. 773; *Consumers' Gas Trust Co. v. Littler*, 162 Ind. 320; 72 N. E. 360 (fifteen days not enough notice); *Consumers' Gas Trust Co. v. Ink*, 163 Ind. 174; 71 N. E. 477; *Consumers' Gas Trust Co. v. Worth*, 163 Ind. 143; 71 N. E. 489; *Consumers' Gas Trust Co. v. Howard*, 163 Ind. 170; 71 N. E. 493; *Campbell v. Rock Oil Co.*, 151 Fed. 191; 80 C. C. A. 467; *Monarch Oil, Gas & Coal Co. v. Richardson*, 30 Ky. L. Rep. 824; 99 S. W. 668.

^{76f} *McClendon v. Busch-Everett Co.*, 138 La. 722; 70 So. 781.

^{76g} *Bubb v. Parker & Edwards Oil Co.*, 252 Penn. 26; 97 Atl. 114; *Deming Inv. Co. v. Lanham*, 36 Okl. 773; 130 Pac. 260.

⁷⁷ *Matthews v. People's Natural Gas Co.*, 179 Pa. St. 165; 39 W. N. C. 544; 27 Pittsb. L. J. (N. S.) 421; 36 Atl. Rep. 216.

⁷⁸ *Mathews v. People's Natural Gas Co.*, 179 Pa. St. 165; 27 Pittsb. L. J. (N. S.) 421; 39 W. N. C. 544; 36 Atl. Rep. 216.

A purchaser cannot insist on suspending payment of royalties because of a danger of eviction, of

§ 188. Failure to operate and not for failure to develop.

Occasionally leases are met with that a failure to develop within the time given for development will not work a forfeiture; but a failure after development to operate will have that effect. Thus in a lease of a coal bank, the lease required the lessee to put the bank in good working order for the rent of the first year, but thereafter to pay a royalty on every bushel of coal taken out; and if the coal bank should remain idle by the act of the lessee, when it would yield coal, for the term of one year, it should be considered abandoned. It was held that a failure to put the coal bank in good working order the first year did not constitute an abandonment of it; the clause of forfeiture not applying to such neglect.⁷⁹ So under a lease giving the lessee the right to hold the premises for two years, and as long thereafter as gas or oil could be produced in paying quantities, a failure to work the wells for two years after the

which he was informed when he took the lease. *Jennings-Heywood Oil Syndicate v. Home Oil & L. Co.*, 113 La. 383; 37 So. Rep. 1.

An oil lease contained a covenant that the lessee was "to stand all expenses of any lawsuit that may arise in defending of said lease." It was held that it was incumbent on the lessee to defend the premises against a prior lessee, and in the event of his failure to do so, on the occupation of the premises by the prior lessee, and the failure to show that the entry of such prior lessee was authorized by the lessor, or that it would be fruitless to assail the lease, or that the entry was made pursuant to some agreement with the lessor, the lessee cannot recover the consideration paid for his lease, which, it was agreed, was to be repaid to him in the event there was any outstanding lease or contract superseding the lease to him. *Conkling v. Krandusky*, 127 N. Y. 567; 112 N. Y. Supp. 13.

⁷⁹ *Moyers v. Tiley*, 32 Pa. St. 267. See *Thompson v. Christie*, 138 Pa. St. 230; 20 Atl. Rep. 934; 11 L. R. A. 236; *Barnsdall v. Boley*, 119 Fed. Rep. 191; and *Parish Fork Oil Co. v. Bridgewater Oil Co.*, 51 W. Va. 583; 42 S. E. Rep. 655; *Gadbury v. Ohio, etc., Gas Co.*, 162 Ind. 9; 67 N. E. Rep. 259; 62 L. R. A. 895; *Gadbury v. Ohio, etc., Gas Co.* (Ind. App.), 65 N. E. Rep. 289; *American Window Glass Co. v. Williams*, 30 Ind. App. 685; 66 N. E. Rep. 912.

Where a lessor of a mineral mine was to be paid only out of the net proceeds, and there were no net proceeds, although the mine was operated, it was held that the lessee was not liable on the ground that he did not continuously work the mine, not being bound to do so in the absence of a special agreement. *Caley v. Portland*, 18 Colo. App. 390; 71 Pac. Rep. 892. See *Colorado, etc., Co. v. Pryor*, 25 Colo. 540; 57 Pac. Rep. 51.

expiration of the first two years was held to work a forfeiture of the lease, notwithstanding oil could have been produced in paying quantities during the time of the abandonment.^{79a} Where the lessee drilled the wells, and then capped them, claiming he could not operate them at a profit, it was held that after five years from the development of the leased premises, the lessee was entitled to have the lease cancelled.^{79b}

§ 189. Continuance of operations.

Where a lease provides a forfeiture for a neglect or failure to operate the oil or gas wells, no makeshifts of operation will prevent the forfeiture. In such an instance the operation of the well means the extraction of oil or gas from the premises; and the lessee cannot successfully claim that entries from time to time to clean and grease an engine which he had erected on the premises and used in pumping oil, or in any other legitimate way, was a continuance of mining operations, in order to prevent a forfeiture.⁸⁰ Cessure of operation for nine months was held to be such a neglect as entitled the lessor to a forfeiture. "In the rapid development and exhaustion of lands,

^{79a} *Cole v. Taylor*, 8 Pa. Super. Ct. Rep. 19; *Howerton v. Kansas Natural Gas Co.*, 81 Kan. 553; 106 Pac. Rep. 47; 34 L. R. A. (N. S.) 34; 82 Kan. 367; 108 Pac. 813.

^{79b} *Collins v. Mt. Pleasant Oil & Gas Co.*, 85 Kan. 483; 118 Pac. 54.

For a lease where the forfeiture clause related only to rentals to be paid for delay in drilling, and not to royalties to be paid for a producing gas well. See *Castle Brook, etc., Co. v. Ferrell*, 76 W. Va. 300; 85 S. E. 544.

Where a lease for five years provided that, on cessation of operations for 60 days, the lease might be forfeited at the option of the lessors, cessation was held to authorize a forfeiture. *Dittman v. Keller*, 59 Ind. App. 448; 104 N. E. 40.

In an oil and gas lease, creating

a specified term, imposing an alternative duty upon the lessee to drill a well within a specified period or pay a stipulated rental for successive periods within the term, there is no implied covenant for diligent operation merely to make the lease profitable to the lessor. The delay rentals provided for are deemed to be full satisfaction and compensation for postponement of operation. *Carper v. United Fuel Gas Co. (W. Va.)*, 89 S. E. Rep. 12. See also *Harris v. Hart (Cal.)*, 119 Pac. 516.

⁸⁰ *Davis v. Moss*, 38 Pa. St. 346.

After a refusal to accept rent for an extension of the term, the lessee need not thereafter commence operations for the purpose of showing diligence. *Consumers' Gas Trust Co. v. Worth*, 163 Ind. 141; 71 N. E. Rep. 489.

cessation of work for nine months is a long period. Often, in far less time, the fluctuations in prices of lands and leaseholds is very great. Perhaps in no other business is prompt performance of contract so essential to the rights of the parties, or delay by one party likely to prove so injurious to the other."⁸¹ A lease of the gas and oil on certain land provided that a test well should be completed on a certain block of leases, which included the land covered by the lease in question and adjoining lands, by a certain date, and that the lessee should, within twelve months from date of the lease, drill a well to completion on the land covered thereby, and further that, in case no well was completed within the twelve months, the lessee should pay a certain annual rental payable quarterly. Shortly after procuring the lease in question, and before the date specified therein, a test well was drilled on adjoining land within the block of leases referred to, on which gas was found, but there being no market therefor or pipe line or other means of transportation to market, the well was shot, cased, tubed, packed, and equipped with appliances used in gas wells to pipe gas to market, and was left in that condition, awaiting means of transportation. Another well was drilled on other adjoining land within the block, but abandoned on striking a flow of salt water, which destroyed the value of the well. The lessee failed to complete a well upon the land covered by the lease within twelve months of the date of the lease, and, upon such failure, he exercised the option provided for in the lease for the payment quarterly of a specified, yearly rental, and tendered the amount thereof to the lessor. It was held that the lessee did not fail to perform the conditions required by the lease to be performed on his part, so as to entitle the lessor to have the lease canceled.^{81a} Where a landlord leases

⁸¹ *Monroe v. Armstrong*, 96 Pa. St. 307. See also *Parish Fork Oil Co. v. Bridgewater Gas Co.*, 51 W. Va. 583; 42 S. E. Rep. 655; *Barnsdall v. Boley*, 119 Fed. Rep. 191; *Federal Oil Co. v. Western Oil Co.*, 112 Fed. Rep. 373; *Buffalo Valley Oil & Gas Co. v. Jones*, 75 Kan. 18; 88 Pac. Rep. 537; *Aeme Oil & M. Co. v. Williams*, 140 Cal. 681; 74 Pac. Rep. 296; *Dill v. Frazee*, 165 Ind. 53; 79 N. E. Rep. 971; *Ohio Oil Co. v. Detamore*, 165 Ind. 243; 73 N. E. Rep. 906; *Logansport &*

W. V. Gas Co. v. Seegar, 165 Ind. 1; 74 N. E. Rep. 500.

The law recognizes a distinction between the abandonment of operations under an oil lease and an intention to abandon or surrender the lease itself. *Parish Fork Oil Co. v. Bridgewater Gas Co.*, 51 W. Va. 583; 42 S. E. Rep. 655; 59 L. R. A. 566.

See the excellent case of *Coffinberry v. Sun Oil Co.*, 68 Ohio St. 488; 67 N. E. Rep. 1069.

^{81a} *Poe v. Ulrey*, 233 Ill. 56; 84 N. E. Rep. 46.

his land, the lessee agreeing to pay an annual rental until the land is developed and after development to pay a different sum, such lessee agreeing to furnish the landlord free gas, the furnishing of such gas, where no well was ever drilled and no offer made to drill one, does not constitute the taking possession for the purposes of the lease, nor is it a part performance of the contract.^{81b}

§ 190. Production of gas will not prevent forfeiture of an oil lease.—Reimbursement.

If the lease is for the development of the leased premises for oil, the production of gas will not prevent its forfeiture, although the gas may be a valuable product.⁸² In such an instance the lessee has no right to be reimbursed the expenses of his operations out of the proceeds of the gas obtained; for an oil and not a gas lease was contemplated by the parties when it was executed.⁸³

§ 191. Covenant uncertain.

To authorize a forfeiture for a failure to keep a covenant, it must not only be valid but also certain. Thus where the lessee covenanted to complete four oil wells within a year, and stipulated if he did not that twenty-two acres should be forfeited for each well not so completed, it was held that the forfeiture clause was void for uncertainty, and could not be enforced.⁸⁴ And where the lessee of a mine covenanted to "use all economy in the conduct and management of the mining enterprise," it was held that it was too uncertain to be recognized as a condition, for the breach of which a forfeiture would be exacted.⁸⁵

Where lessors accepted and used gas supplied by a gas company and paid for by the lessees in consideration for which the lessees were granted an extension of time to open a well producing oil and gas, which, by reason of the intermingling of the oil, and for want of marketable facilities of the oil, was unprofitable to operate for either gas or oil, it was held neither to extend the terms of the lease nor waive conditions of forfeiture for non-compliance therewith, especially after the expiration of the term contracted for, and in the absence of a well

profitably producing either. *Miller v. Vandergrift*, 30 Ohio Cir. Ct. Rep. 730.

^{81b} *Hancock v. Diamond Plate Glass Co.*, 37 Ind. App. 351; 75 N. E. Rep. 659.

⁸² *Truby v. Palmer*, 4 Cent. Rep. (Pa.) 925; 6 Atl. Rep. 74.

⁸³ *Palmer v. Truby*, 136 Pa. St. 556; 20 Atl. Rep. 516.

⁸⁴ *Thomas v. Kirkbride*, 15 Ohio Cir. Ct. Rep. 294; 8 Ohio Dec. 181.

⁸⁵ *Benaïvder v. Hunt*, 79 Tex. 383; 15 S. W. Rep. 396. See *Swift v. Occidental M. & L. Co.* 141 Cal. 161; 74 Pac. Rep. 700.

§ 192. Re-entry.

A forfeiture may be incurred by a breach of either a covenant or a condition subsequent. If it be incurred by reason of a breach of a covenant, then the right of re-entry must be reserved to work a forfeiture.⁸⁵ In the case of a condition subsequent a right of re-entry need not be expressly reserved if the condition is expressed. But a re-entry is necessary to defeat the lease,⁸⁷ or acts that are equivalent to it — such as bringing an action in ejectment.⁸⁸ If a lessor be in possession, then a re-entry is not necessary, nor is a demand for possession. The law does not require a useless act. In the case of a gas or oil lease, where the lessor is in possession of the ground for the purposes of tillage, he has such a possession as not to require a re-entry,⁸⁹ and there must be a breach of the condition or covenant

In all oil and gas leases a covenant to "protect the lines" and to "well develop" the land is implied, and the fact that such covenants are expressed in the same general words adds nothing to the lessee's obligation, and the lease cannot be forfeited for a breach of such covenants where he has in good faith done what in his judgment was required to comply therewith. *Kellar v. Craig*, 126 F. 630.

⁸⁵ *Doe v. Jepson*, 3 B. and Ad. 402; 1 L. J. K. B. 154; *Jones v. Carter*, 15 M. and W. 718; *Clark v. Jones*, 1 Denio 516; *Brown v. Bragg*, 22 Ind. 122; *Den. v. Post*, 25 N. J. L. 285; *Wheeler v. Earl*, 5 Cush. 31.

⁸⁷ *Andrews v. Senter*, 32 Me. 394; *Bowen v. Bowen*, 18 Conn. 535; *Rollins v. Riley*, 44 N. H. 9; *Hamilton v. Elliott*, 5 S. and R. 375; *Hawkins v. Pepper*, 117 N. C. 407; 23 S. E. Rep. 434; *Acme Oil & M. Co. v. Williams*, 140 Cal. 681; 74 Pac. Rep. 296.

Where there is a condition of re-entry for nonpayment of rent in a lease of property for the purpose of quarrying stone, the lessor cannot re-enter unless he has made a demand of the precise rent due on the very day on which it becomes due, and on the most notorious place on the land, although there should be no person on the land ready to pay it. *Homet v. Singer*, 35 Pa. Super. Ct. 491.

⁸⁸ *Goodright v. Cator*, 2 Dougl. 485; *Doe v. Masters*, 2 B. and C. 490; *Osgood v. Abbott*, 58 Me. 73; *Fonda v. Sage*, 46 Barb. 109; *Stearns v. Harris*, 8 Allen 597; *McKelway v. Seymour*, 29 N. J. L. 321; *Boys v. Robinson* (N. J. L.), 38 Atl. Rep. 813; *Hoch v. Bass*, 133 Pa. St. 328; 19 Atl. Rep. 360. As in the usual lease of premises for gas. *Gadbury v. Ohio, etc., Gas Co.*, 102 Ind. 9; 67 N. E. Rep. 259; 62 L. R. A. 895; *Sult v. A. Hochstetler Oil Co.*, 63 W. Va. 317; 61 S. E. Rep. 307.

⁸⁹ *Guffey v. Hinkill*, 34 W. Va. 49; 11 S. E. Rep. 754; 8 L. R. A. 759; *Adams v. Ore Knob Copper Co.*, 7 Fed. Rep. 634; *Allegheny Oil Co. v. Bradford Oil Co.*, 86 N. Y. 638; affirming 21 Hun 26; *Hawkins v. Pepper*, 117 N. C. 407; 23 S. E. Rep. 434; *Maxwell v. Todd*, 112 N. C. 677; 16 S. E. Rep. 926; *Island Coal Co. v. Combs*, 152 Ind. 379; 53 N. E. Rep. 452; *Ray v. Western Pennsylvania N. Gas Co.*, 138 Pa. 576; 20 Atl. Rep. 1065; 11 L. R. A. 290.

Where a grantor of an oil lease conveyed only the right to drill for oil on his land, together with the oil and gas recovered, and the right to go on the land for such purposes only, subject to certain conditions, such right was an incorporeal hereditament, incapable of livery of seisin, and therefore not subject to reentry. *Monaghan v. Mount*, 36 Ind. App. 188; 74 N. E. 579.

mentioned in the lease.⁹⁰ The right to re-enter, however, may be waived or deferred, as by an act extending the time within which a payment of the rent might be made. Even if notice to quit is given, but accompanied by an assurance that another notice will be given, the right to re-enter is not complete until such second notice has been served on the lessee.⁹¹ If the re-entry be illegal, and the lessor operate the oil wells, he must account to the lessee for the oil taken out by him at its market value, less the royalty and the actual cost of operating the wells, of permanent and necessary improvements made by him, and of money actually paid by him for labor claims against the lessee's property.⁹² If the lessee dispute all the assertions of forfeiture, but the lessor has re-entered, a preliminary injunction will be awarded and continued to restrain the lessor for continued interference with the premises;⁹³ and the lessor cannot, under such circumstances, apply for a preliminary injunction to restrain the lessee from entering upon the premises.⁹⁴

§ 193. Releasing premises equivalent to a re-entry.

The execution of a second lease to a third person, after forfeiture incurred, is equivalent to a re-entry, and is as effectual for all purposes as the re-entry itself.⁹⁵ A demand for the

⁹⁰ *Harris v. Ohio Coal Co.*, 57 Ohio St. 118; 48 N. E. Rep. 502; *McKnight v. Kreutz*, 51 Pa. St. 232. See *Thompson v. Christie*, 138 Pa. St. 230; 20 Atl. Rep. 934; 11 L. R. A. 236.

⁹¹ *Wakefield v. Sunday Lake, etc.*, Co., 85 Mich. 605; 49 N. W. Rep. 135.

⁹² *Wakefield v. Sunday Lake, etc.*, Co., 85 Mich. 605; 49 N. W. Rep. 135.

⁹³ *Potterie Gas Co. v. Potterie*, 153 Pa. St. 10; 25 Atl. Rep. 1107.

⁹⁴ *Potterie v. Potterie Gas Co.*, 153 Pa. St. 13; 25 Atl. Rep. 1107.

A right of re-entry is good as against a purchaser of the leasehold interest at execution sale; and a subsequent redemption by the lessee from such purchaser does not nullify the forfeiture. *Aeme Oil & M. Co. v. Williams*, 140 Cal. 681; 74 Pac. Rep. 296.

A right of re-entry belonging to the lessor for condition broken, is good against a purchaser of the leasehold interest at execution sale; and a subsequent redemption by the lease from such a purchaser does not nullify the forfeiture. *Aeme Oil & M. Co. v. Williams*, 140 Cal. 681; 74 Pac. Rep. 296.

⁹⁵ *Allegheny Oil Co. v. Bradford Oil Co.*, 86 N. Y. 638; affirming 21 Hun 26; *Huggins v. Daley*, 99 Fed. Rep. 606; 40 C. C. A. 12; 48 L. R. A. 320; *Guffey v. Hukill*, 34 W. Va. 49; 11 S. E. Rep. 754; *Kenton Gas, etc., Co. v. Dorney*, 17 Ohio Cir. Ct. Rep. 101; 9 Ohio Cir. Dec. 604; *Conkling v. Krandsky*, 127 N. Y. App. 567; 112 N. Y. Supp. 13; *Wade v. South Penn. Oil Co.*, 45 W. Va. 380; 32 S. E. 169; *Edwards v. Hale*, 37 W. Va. 163; 16 S. E. 587; *Carnegie Nat. Gas Co. v. Philadelphia Co.*, 158 Pa. 317; 27 Atl. 95;

payment of the rent due, where the forfeiture is for that reason, is not necessary before executing the second lease.⁹⁶ Not in every instance, however, will the execution of a second lease be equivalent to a re-entry nor to a declaration of a forfeiture. Thus giving a second lease subject to the first one is not a re-entry nor a declaration of a forfeiture.⁹⁷ And where the second lease is silent on the subject of the forfeiture of the first lease, oral evidence is admissible to show it was not the intention of the lessor to declare a forfeiture of such first lease.⁹⁸ And if there has been a waiver of the time or manner of payment of the rent specified in the first lease, the execution of a second lease because of a failure to make payment in the manner and at the time required by such first lease will not be sufficient to complete its forfeiture.⁹⁹ Where a lease has not only been forfeited but also abandoned by the lessee, and he has given up all hope of developing the lands, the execution of a second lease by the lessor, "subject to" the first lease, will not be construed as a recognition of the validity of such first lease.¹⁰⁰ Where a first lease had expired, and also a second one given to a third person, and the lessee under the first lease took possession with the lessor's consent, and at great expense produced oil in paying quantities, it was held that the second lessee could not maintain an action for the possession of the premises.¹⁰¹ Where the first lease requires the lessee to re-convey the premises, in case of acts of forfeiture or abandonment, the execution of a second lease will not work a forfeiture.¹⁰² Where a part of the premises were subleased by the lessee, subject to the conditions of

Wolf v. Guffey, 161 Pa. 276; 28 Atl. 1117; *Eclipse Oil Co. v. South Penn. Oil Co.*, 47 W. Va. 84; 34 S. E. 923; *Martel v. Jennings-Heywood Oil Syndicate*, 114 La. 903; 38 So. 253.

⁹⁶ *Wolf v. Guffey*, 161 Pa. St. 276; 28 Atl. Rep. 1117; *Parish Fork Oil Co. v. Bridgewater Gas Co.*, 51 W. Va. 583; 42 S. E. Rep. 655; 59 L. R. A. 566.

⁹⁷ *Schaupp v. Hukill*, 34 W. Va. 375; 12 S. E. Rep. 501; *Henne v. South Penn. Oil Co.*, 52 W. Va. 192; 43 S. E. Rep. 147; *Stone v. Marshall*, 188 Pa. 602; 41 Atl. 748, 1119; *Hukill v. Myers*, 36 W. Va.

639; 15 S. E. 151; *Lowther Oil Co. v. Guffey*, 52 W. Va. 88; 43 S. E. 101; *Bartley v. Phillips*, 165 Pa. 325; 30 Atl. 842; *Bartley v. Phillips*, 179 Pa. 175; 36 Atl. 217.

⁹⁸ *Thomas v. Hukill*, 34 W. Va. 385; 12 S. E. Rep. 522.

⁹⁹ *Hukill v. Meyers*, 36 W. Va. 639; 15 S. E. Rep. 151.

¹⁰⁰ *Elk Fork Oil and Gas Co. v. Jennings*, 84 Fed. Rep. 839.

¹⁰¹ *Thomas v. Hukill*, 34 W. Va. 385; 12 S. E. Rep. 522.

¹⁰² *Northwestern Ohio, etc., Co. v. Browning*, 15 Ohio Cir. Ct. Rep. 84; 8 Ohio Cir. Dec. 188.

the first lease, which the sublessee assumed, but the lessee continued to pay the rent until the last payment, when he defaulted; and thereupon the lessor executed a second lease to the sublessee for the entire premises, providing that such sublessee should stand between him and "all who may have claim to this lease," this was held not to work a forfeiture of the first lease.¹⁰³ Where a lease is executed giving the lessor an option to declare it forfeited, under certain circumstances, which have occurred, the execution of a second lease after the occurrence of the facts authorizing a forfeiture is a sufficient declaration of the lessee that he is exercising his right of option to declare the first lease forfeited or at an end.¹⁰⁴

§ 194. Surrender after assignment or conveyance.—Forfeiture.

After he has made an assignment of a lease, the lessee has no power to make a surrender of it, nor to take advantage of his own default, where he would have had the right if he had remained the owner of the lease; nor can the lessor declare a forfeiture after he has conveyed away the premises.¹⁰⁵ After the lessor has transferred a lease, he has no power to accept a surrender of it, but the acceptance must be by his assignee or grantee.¹⁰⁶

§ 195. Forfeiture of only part of lease.

If the lease require several wells, within different periods of time to be drilled, a failure to put down all of them within the several times required will not always work a forfeiture of the entire lease. Of course, to prevent a forfeiture of the entire lease the wells actually drilled must be paying or producing wells, for dry wells will not keep a lease alive. In

¹⁰³ *Akin v. Marshall Oil Co.*, 188 Pa. St. 602; 41 Atl. Rep. 748.

¹⁰⁴ *Huggins v. Daley*, 99 Fed. Rep. 606; 40 C. C. A. 12; 48 L. R. A. 320.

A second lease that is void, because the lessee therein had notice of the first lease, will not work a forfeiture. *Friend v. Mallory*, 52 W. Va. 53; 43 S. E. Rep. 114.

The grantee in a deed conveying land subject to an oil lease was held to have a right, over objection

of his grantor entitled to royalty, if producing wells be drilled, to extend, before expiration thereof, a lease which left it optional with the lessee to drill. *Bond v. Priest* (W. Va.), 88 S. E. 114.

¹⁰⁵ *Ohio Iron Co. v. Auburn Iron Co.*, 64 Minn. 404; 67 N. W. Rep. 221.

¹⁰⁶ *Thompson v. Christie*, 138 Pa. St. 230; 27 W. N. C. 87; 20 Atl. Rep. 834; 11 L. R. A. 236.

one case where the wells were to be completed within successive periods of time, and while two were completed the third was not, the lease was considered forfeited as to one-third of the territory covered by it.¹⁰⁷ If the number of wells to be sunk on the leased premises are not stated in the lease, the lessee cannot escape by sinking a single producing well, or even two or three, if not sufficient to develop and secure all the oil under the surface. He must sink enough wells to secure all the oil, especially if it is probably escaping to adjoining premises in which he is interested; and if he do not, he will forfeit all that part of the premises not sufficiently occupied with wells.¹⁰⁸ By a number of leases, similar in terms, obtained from several persons, a lessee acquired the exclusive right in a large territory to drill and operate for oil and gas. He agreed to give each lessee a certain portion of the oil obtained, and pay a certain annual sum for each gas well. On pain of forfeiture he was required to put down one test well within a year from the date of the leases. The leases were to run ten years. The putting down of one test well within a year was not considered sufficient to vest in him an absolute right to the territory covered by all the leases, it was said, but he must proceed and develop within a reasonable time after sinking such test well at least one well on each of the leased premises, and a failure to do so as to any one lease was an abandonment of the premises described in it. In passing on the case the court used the following language:

“With the conclusion reached by the lessors that Johnston (the lessee) had abandoned the leases, we fully concur, and we

¹⁰⁷ *Cryan v. Riddelsperger*, 7 Pa. Co. Ct. Rep. 473. See *Baldwin v. Ohio Oil Co.*, 13 Ohio Cir. Ct. Rep. 519; 7 Ohio Dec. 50.

A stipulation that twenty-two acres shall be forfeited for every one of the required wells not sunk is void for uncertainty. *Thomas v. Kirkbridge*, 15 Ohio Cir. Ct. Rep. 294; 8 Ohio C. D. 181.

¹⁰⁸ *Colgan v. Forest Oil Co.*, 30 Pittsb. L. J. (N. S.) 68. In this

case twenty days were given in which to sink the required wells, and if not so done, the unoccupied part of the premises were to be forfeited. Same rule in *Young v. Vandergrift*, 30 Pittsb. L. J. (N. S.) 39. But both cases were reversed. *Young v. Forest Oil Co.*, 194 Pa. St. 243; 45 Atl. Rep. 121; *Colgan v. Forest Oil Co.*, 194 Pa. St. 234; 45 Atl. Rep. 119; *Coffinberry v. Sun Oil Co.*, 68 Ohio St. 488; 67 N. E. Rep. 1069.

further find from the evidence that, as to these particular leases, it was his intention to do so. Both public and private interests require that such facts as are disclosed by the testimony in these cases should be held by a court of equity to constitute abandonment of the leases involved, because of non-development. It should be kept in mind that Johnston in all these leases was the party who was to take initiative. He was the actor who was to commence development and make the search on all the land described in them. This he, for reasons of his own, so far as these particular leases were concerned, failed to do from 1889 to 1897. He now asks a court of equity, after such unreasonable delay on his part, and gross neglect of his implied duty, and after there has been a material change in the situation, brought about by the efforts of others in interest, to decree that he is entitled to the possession of the property he had abandoned. To so decree would be not only unconscionable, but would retard the development of the country, and at the same time it would reward those who have been negligent, and punish those who have been prompt, in the discharge of their contract duties.

“After Johnston caused the Smith well to be drilled it was his privilege to determine — using for that purpose the information secured by that well — in what direction and in what particular tracts of land he would make his subsequent developments, and, if, in so doing, his conduct and his declarations resulted in the abandonment of the leases located in other sections, for any misfortune occasioned to him thereby he must hold his own judgment responsible and not the judgment of the court. It was evidently not the intention of Johnston, when the numerous leases were executed to him in 1889, amounting in the aggregate to over twenty thousand acres, to drill wells upon each and every separate tract, but he intended, using each separate search as an indicator, to locate, if possible, the points where oil and gas could be found, and, having done that, to abandon those leases that previous development had shown to be located in unprofitable localities. That he, and those operating under him, regarded the leases in the Elk Fork region of Tyler County as worthless, in an oil-producing sense, is, we

think, fully shown by the testimony, and such conclusion on his and their part is but another illustration of the uncertainty and surprises that come to those engaged in the development of oil territory."

An important feature of the case is treated as follows:

"The fact that all the Paova leases contained the following clause, 'subject to the Johnston lease,' must be considered in connection with the circumstances surrounding the parties when they executed the same. In our judgment, the lessors intended by these words to incorporate into their contracts the fact that they had advised their lessee that the land had been theretofore leased to Johnston, and that he was to take it subject to the old lease, with the understanding that if the Johnston lease was valid, he took nothing by the new grant, but that if it was invalid, the conveyance was then to stand as a contract between the parties. To hold, as insisted upon by counsel for defendants, that said words were intended as an admission of the validity of the Johnston leases, would be to hold that the parties to the new leases, admitted by them that the lessor had nothing to grant, and that consequently there was nothing for the lessee to take. Clearly does it appear that such was neither the belief nor the intention of the parties. Under similar circumstances, learned counsel would doubtless have employed other and more apt language, but still we think the words used are sufficient to enable the court to read the contract as we have construed it, and thereby get not only near to, but exactly at, the intention of the parties."¹⁰⁹

¹⁰⁹ Elk Fork Oil and Gas Co. v. Jennings, 84 Fed. Rep. 839.

Where a lessor has received the substantial cash consideration stipulated as consideration for drilling wells desired by the lessee, he cannot retain the money as consideration for one well and demand annulment of the lease as to undeveloped land on the ground that the lessee has violated an implied obligation to fully develop the land.

McClendon v. Busch-Everett Co., 138 La. 722; 70 So. 781.

An oil lease binding the lessee to drill wells, and containing a potestative condition, may be annulled by the lessor, except as to wells already drilled, as to which the potestative condition cannot be invoked, where the lessor has enjoyed all his rights in respect thereto. Caddo Oil & Mining Co. v. Producers' Oil Co., 134 La. 701; 64 So. 684.

§ 196. Partial development.—Abandonment.

A partial development may prevent a forfeiture for a failure to develop, even as to the entire premises. Thus where a lease was for twenty years; two wells to be drilled, the first within the first year, and the second in two years; and if the second produced sufficient gas to be capable of use, the consideration in full for such well to be a certain rental; if there was delay in the completion of the two wells, the annual rentals were to be paid and accepted in full consideration for the delay; and the lessee drilled the first well, but not the second, obtained gas in sufficient quantity to use it; for more than two years paid the rental, when the well and casing were plugged, and the "rig" taken down; and the lessee never drilled the second well. nor paid the lessor anything for a failure to do so, it was held that these facts did not show an abandonment of the lease.¹¹⁰ But where the lessee was to complete a well within six months. or thereafter within sixty days remove all machinery and buildings, in which event the lease was to be null and void. unless further prosecuted after the first well was drilled—it was held, after the first well was drilled, that the lease was avoided by a failure to further operate for mining purposes for a period of several years.¹¹¹ A lessee of seventy-four acres. leased on a royalty for a term of five years, and as much longer "as oil or gas was found in paying quantities," by the terms of the lease was required to complete a well thereon within three months. He completed this well on time, but drilled no others, and made no serious effort to do so during the five years, although the lessor repeatedly urged him to do

¹¹⁰ *Ahrns v. Chartiers Valley Gas Co.*, 188 Pa. St. 249; 41 Atl. Rep. 739. See *Monfort v. Lanyon Zinc Co.*, 67 Kan. 310; 72 Pac. Rep. 783.

As to what is a development of the leased premises, see *Consumers' Gas Trust Co. v. Littler*, 162 Ind. 320; 70 N. E. 363, for a decision.

Where no work was commenced it was held there was no abandonment of a hundred years' lease to mine coal, even though the lessee had neither paid rent nor searched

for coal. *Plummer v. Hillside Coal and Iron Co.*, 160 Pa. St. 483; 34 W. N. C. 366; 28 Atl. Rep. 853.

¹¹¹ *Heintz v. Shortt*, 149 Pa. St. 286; 24 Atl. Rep. 316.

The law recognizes a distinction between the abandonment of operation under an oil lease and an intention to abandon or surrender the lease itself. *Parish Fork Oil Co. v. Bridgewater Gas Co.*, 51 W. Va. 583; 42 S. E. Rep. 655; 59 L. R. A. 566.

so. The well drilled was a small producer, not paying the expense of operating it. After the expiration of the term of five years, the lessee applied to a court of equity to enforce the lease against the lessor and those to whom a lease had been given after the expiration of the five years; but the court refused to do so, basing its refusal on the ground that the plaintiff had not complied with the implied condition of the lease, which required him to develop the property in good faith.¹¹² If the lessor sell part of the leased land, he can not enforce a forfeiture of the lease as to the land sold for a subsequent breach of condition.^{112a}

§ 197. Lessee draining leased premises by wells on adjoining territory.

A lessee cannot hold the leased premises and drain them by sinking oil wells on adjoining premises; and if he persist in such conduct he will forfeit his lease. In an instance of this character, or at least where there was danger that the leased

¹¹² *Barnsdall v. Boley*, 119 Fed. Rep. 191. See *Jackson v. American Natural Gas Co.*, 31 Pa. Super Ct. Rep. 408. A well must be drilled down to where gas or oil is or should be. *Consumers' Gas Trust Co. v. Littler*, 162 Ind. 320; 70 N. E. 363.

The lessee could release any part of the tract it desired; but, since it need not drill any wells after drilling the first nonpaying well, its failure to do so or its abandonment of a well drilled would not be an abandonment of its exclusive right to drill on any unreleased part during the year, nor would the release of a third of the tract be an abandonment of the whole tract for drilling purposes; that provision of the lease privileging the lessee to continue operations on the part of the tract on which it may have drilled wells upon the release of a part only referring to the released land. *O'Neil v. Sun Co.* (Tex. Civ. App.), 123 S. W. 172.

An oil lease covered three separate tracts. The lessee had two years to drill a well on the premises, and

the time could be enlarged by the payment of an annual rental from the expiration of the second year until the well was drilled; and if no well was drilled on the premises within five years, the lease should be void. It was held that a well having been drilled on one of the tracts during the fifth year, and the stipulated rental paid from the end of the second year until the well had been drilled, the lease was not void because other wells were not drilled during the five-year period. *Brewster v. Lanyon Zinc Co.*, 140 Fed. Rep. 801; 72 C. C. A. 213.

A father and son leased their separate premises. It was provided that a well should be drilled on the son's land after the completion of one on the father's. The lessee drilled on the son's land first; and thereby caused unusual delay in drilling on the father's land. It was held that the father was entitled to have his lease cancelled. *Kimball Oil Co. v. Keeton* (Ky.), 101 S. W. Rep. 887; 31 Ky. L. Rep. 146.

^{112a} *Brewster v. Lanyon*, 140 Fed. 801; 72 C. C. A. 213.

premises would be drained of its oil by wells operated on adjoining premises by the lessee, it was held to be the duty of the lessee to open as many wells on the leased premises as was necessary to secure the common advantage of the lessor and himself, and to prevent the loss of oil under the lessor's land by drainage into the adjoining wells; in default of which the lease might be declared forfeited.¹¹³

§ 198. Lessee draining away oil by sinking wells on adjoining premises.

But if the lessee has complied with the terms of his lease, the lessor cannot declare a forfeiture on the ground that such lessee has leased adjoining territory and is draining his, the lessor's, premises through the wells upon such territory, although the conduct of the lessee may inflict upon him great damages.¹¹⁴

§ 199. Inability to complete work.—Inclement weather.

The lessee cannot always urge successfully as an excuse that the weather was so inclement that he could not drill the wells within the time fixed by the lease, or operate them continuously after they were drilled. In order to do this he should have inserted in the lease a clause preventing a forfeiture because of that fact.¹¹⁵ In the first case cited the lease required one well to be completed within five months, a second within one year, and a third within two years. The first and second wells were completed on time; but the third was not, although before the expiration of the two years the lessee had placed timber upon the leased premises for a complete carpenter's rig, but was unable to secure workmen to build the rig. The failure to secure workmen was held to be no excuse, and on trial the lease was declared forfeited. This was a *nisi prius* decision. But in the

¹¹³ *Kleppner v. Lemon*, 176 Pa. St. 502; 38 W. N. C. 388; 35 Atl. Rep. 109; *Coffinberry v. Sun Oil Co.*, 68 Ohio St. 488; 67 N. E. Rep. 1069; *Barnard v. Monongahela Natural Gas Co.*, 216 Pa. 362; Atl. Rep. 801.

¹¹⁴ *Ohio Oil Co. v. Harris*, 1 Ohio Dec. 157; same case 1 Ohio N. P.

132. See *Parish Fork Oil Co. v. Bridgewater Oil Co.*, 51 W. Va. 583; 42 S. E. Rep. 655; *Barnard v. Monongahela Natural Gas Co.*, 216 Pa. 362; 65 Atl. Rep. 801.

¹¹⁵ *Cryan v. Riddelsperger*, 7 Pa. Cir. Ct. Rep. 473; *Kennedy v. Crawford*, 138 Pa. St. 561; 21 Atl. Rep. 19.

State where this decision was given the Supreme Court held that if the lessee, on the last day of the period allowed, in good faith entered on the premises and began operations preparatory to drilling a well, but was prevented by the lessor from proceeding farther (it being impossible to begin the well on time), there was no forfeiture;¹¹⁶ and in another State where the lessee was not able to complete the well on time, because the excessively muddy condition of the roads rendered it impossible to get the necessary machinery on the premises in time, it was held that there was no forfeiture.¹¹⁷ Where an excuse was set up by lessees as a defense that they were working other leases and were "approaching these lands as fast as they could, and that they could not work these lands for want of railroad facilities," it was held that this was an insufficient excuse. "Counsel's contention is," said the court, "that the enterprise could not be abandoned unless it had been begun. They insist that the meaning of the contract is that the lease continues to subsist for the full term of twenty years, though not a single thing is done under it on the land, and even though no intention exists on the part of the lessees to do anything under the terms thereof. We think it quite clear that such was not the intent of the parties as gathered from the lease itself. No reason is perceived why it would not be as injurious to the lessors to fail to commence operating the mines and quarries for twelve months as to cease operating them, after beginning, for a period of twelve months."¹¹⁸

¹¹⁶ *Henderson v. Ferrell*, 183 Pa. St. 547; 38 Atl. Rep. 1018.

¹¹⁷ *Fleming Oil and Gas Co. v. South Penn. Oil Co.*, 37 W. Va. 645; 17 S. E. Rep. 203. See *Forney v. Ward* (Tex. Civ. App.), 62 S. W. Rep. 108; *Lane v. Gordon*, 18 N. Y. App. Div. 438; 46 N. Y. Supp. 57.

In an action to cancel a mining lease for failure to do work as agreed, the sickness of leases and a stringency in the money market, preventing their securing necessary funds, furnished reasons why they were not as diligent as they should have been, and are entitled to weight in determining the rights of the parties. *Ross v. Sheldon* (Ky.), 119 S. W. 225.

¹¹⁸ *Woodard v. Mitchell*, 140 Ind. 406; 39 N. E. Rep. 437.

See where a failure to begin for five and a half years to develop a mine was held not to work a forfeiture. *Baumgardner v. Browning*, 12 Ohio Cir. Ct. Rep. 73; 5 Ohio Cir. Dec. 394.

Where the lessee in an oil lease is to commence operations in six months, but the only express stipulation for forfeiture is in case a test well is not completed in three years, a suit to cancel the lease, begun several months before the three years have expired, without an averment that the well cannot be completed in time, is premature, though failure to commence operations within the six months is alleged. *Armitage v. Mt. Sterling Oil & Gas Co. (Ky.)*, 80 S. W. 177; 25 Ky. Law Rep. 2262.

§ 200. Mortgage of leasehold may work a forfeiture.

A lease may prohibit the lessee placing a mortgage on the leasehold under the penalty of its forfeiture if he do so. And if the lease prohibit, under the penalty of forfeiture, a transfer of it by the lessee, the mortgaging of the leasehold by such lessee, followed by a sale thereunder, will have the same effect as a transfer of the lease. Where in such an instance, the leasehold was sold under the mortgage at a constable's sale, it was said: "The mortgage upon the leasehold through which he claims, fell with the forfeiture. The creation of the mortgage was prohibited in substance by the lease, and was a ground of forfeiture. The lessee, having no right to assign his lease, could not do so indirectly by mortgaging it. As against the landlord the mortgage was a nullity, and it cannot be successfully set up as against the title acquired through the forfeiture and constable's sale."¹¹⁹

§ 201. When work must be completed.

Not only must the work be commenced within the time specified, but it must be completed within the time limited, in order to avoid a forfeiture. But if the work has been completed in time, a forfeiture will not be declared simply because it has not been completed in the order specified in the lease. Thus where two wells were to be completed the first six months of the second year, and two more the second six months of such year, a completion of four wells within that year was considered to be such a substantial compliance with the lease as to defeat a forfeiture.¹²⁰ Where the lease required a well to be completed within three months, and all wells within eighteen months, it was held that the court would not direct how the lessee should work the premises, or how many wells should be sunk; and that the lessor could insist on a forfeiture simply because the lessee had not been sufficiently active in developing the property.¹²¹

¹¹⁹ *Becker v. Werner*, 98 Pa. St. 555.

¹²⁰ *Thomas v. Kirkbridge*, 15 Ohio Cir. Ct. Rep. 294; 8 Ohio Dec. 181.

¹²¹ *Baldwin v. Ohio Oil Co.*, 13 Ohio Cir. Ct. Rep. 519; 7 Ohio Dec. 50.

Where a well was to be commenced within sixty days and completed within five months, a failure to complete a well within five months that was begun within the sixty days was held to work a forfeiture of the lease.¹²²

§ 202. Excavating for oil means bringing it to the surface.

Where a lease provides for the diligent prosecution of the undertaking to success or abandonment and for a forfeiture if oil be not excavated in paying quantities on or before a given date, the oil must be raised to the surface, and merely finding it in the earth within the time given will not prevent a forfeiture, if it be not pumped or rise to the surface of the earth.¹²³

§ 203. Failure to pay royalty or report them.

A mere failure to pay royalties due under the lease will not give the lessor sufficient ground to declare a forfeiture, unless by the express terms of the lease he is given that right and power.¹²⁴ But a failure to either develop the leased premises or pay rent, within the time named, may be sufficient evidence from which an inference of abandonment may be drawn.¹²⁵ If the lessor is to receive a certain portion of "all of the profits" realized from oil or gas found on the premises, that means the net profits; and he cannot declare a forfeiture for neglect of the lessee to account at a time when the proper expenses of the lease exceed the receipts.¹²⁶ A lease provided for a yearly rental of

¹²² *Cleminger v. Baden Gas Co.*, 159 Pa. St. 16; 33 W. N. C. 480; 28 Atl. Rep. 293; *Huggins v. Daley*, 99 Fed. 606; 40 C. C. A. 12; 48 L. R. A. 320; *Fleming Oil & Gas Co. v. South Penn. Oil Co.*, 37 W. Va. 645; 17 S. E. 203; *Forney v. Ward*, 25 Tex. App. 443; 62 S. W. 108; *Henderson v. Farrell*, 183 Pa. 547; 38 Atl. 1018; *Detlor v. Holland*, 57 Ohio St. 492; 49 N. E. 690; 40 L. R. A. 266.

¹²³ *Kennedy v. Crawford*, 138 Pa. St. 561; 21 Atl. Rep. 19. See *Parish Fork Oil Co. v. Bridgewater Oil Co.*, 51 W. Va. 583; 42 S. E. Rep. 655; 59 L. R. A. 566.

¹²⁴ *Wakefield v. Sunday Lake, etc. Co.*, 85 Mich. 605; 49 N. W. Rep. 135; *Ammons v. South Penn. Oil Co.*, 47 W. Va. 610; 35 S. E.

Rep. 1004. See *Edwards v. Iola Gas Co.*, 65 Kan. 362; 69 Pac. Rep. 350; *Davis v. Chataqua Oil & Gas Co.*, 78 Kan. 97; 96 Pac. 47.

If the lessor by his conduct clearly indicates that payment will not be demanded when due, he cannot, without demand or notice, declare a forfeiture. *Pyle v. Henderson*, 65 W. Va. 39; 63 S. E. Rep. 762.

¹²⁵ *Marshall v. Forest Oil Co.*, 198 Pa. St. 83; 47 Atl. Rep. 927; *Barnhart v. Lockwood*, 152 Pa. St. 82; 25 Atl. Rep. 237; *Zeigler v. Dailey*, 37 Ind. App. 240; 76 N. E. Rep. 198.

¹²⁶ *Potterie Gas Co. v. Potterie*, 179 Pa. St. 68; 36 Atl. Rep. 272.

In such an instance, a stipulation

four hundred dollars, payable quarterly, the amount to be deducted from royalties when in excess of that sum. The royalties were payable quarterly on ore as sold and delivered. The lease also provided that if payments were not made at the time specified, the lease should be void. It was held that a failure to fully pay all royalties on ore sold and delivered at the end of each quarter year worked a forfeiture of the lease.¹²⁷

§ 204. Payment of rent will not prevent forfeiture for neglect to develop.

Payment of the rent will not always prevent a forfeiture for a neglect or failure to develop, or for a neglect to operate after development. Thus where the lease was for two years, and as much longer as oil was found in paying quantities; and it provided for the commencement of a well in thirty days, and its completion in ninety days, or, in default, the payment of an annual rental of sixty dollars from the time named for the completion of the well until it should in fact be completed; it was held that the lessee could not keep the lease alive after the two year limit by the payment of an annual rental merely.¹²⁸ To hold that he could do so, was considered by the court to convert the lease into a perpetual option to drill for oil and gas, when the apparent purpose of the lessor was to compel the develop-

that the lessee should "use all economy in the conduct and management of the mining enterprise," is too uncertain to be recognized as a condition, for the breach of which a forfeiture may be enacted. *Benavides v. Hunt*, 79 Tex. 383; 15 S. W. Rep. 396.

¹²⁷ *Boys v. Robinson* (N. J. L.), 38 Atl. Rep. 813.

The amount of deposit made by a tenant to secure the observance of the conditions of a lease, cannot be applied to the payment of rent, so as to avoid a forfeiture, otherwise than in conformity to the conditions of the deposit. *Rosenquist v. Canary*, 15 N. Y. Misc. 148; 36 N. Y. Supp. 979; 72 N. Y. St. Rep. 422.

Where an oil lease provided for the payment of \$50 per month in advance after a fixed term of 60 days, failure of the lessees to pay such rent during one month rendered the lease null and void, under the provisions of the lease, from the first day of the month in which such payment was to be made. *Murdock-West Co. v. Logan*, 69 N. E. 984, 69 Ohio St. 514.

¹²⁸ *Western Pennsylvania Gas Co. v. George*, 161 Pa. St. 47; 28 Atl. Rep. 1004; followed in *Indiana Natural Gas & Oil Co. v. Granger*, 33 Ind. App. 559; 70 N. E. Rep. 395; *Boys v. Robinson* (N. J. L.), 38 Atl. Rep. 813; *American Window Glass Co. v. Williams*, 30 Ind. App. 685; 66 N. E. Rep. 912.

ment of his land within the period of two years.¹²⁹ If a lease provide that it shall be forfeited for a neglect to pay any of the payments required to be made, a whole payment is meant and not a balance on a running account.¹³⁰ Where the lessee was to pay a stipulated annual rental of fifty cents an acre, until, in his judgment, "oil or gas cannot be found on the premises, or, having been found, has ceased to exist," it was held there was a clear engagement to explore for gas and oil and develop the premises within a reasonable time.^{130a}

¹²⁹ The Appellate Court cited *Hollingsworth v. Fry*, 4 Dall. 345, and *Packer v. Noble*, 103 Pa. St. 188. See *National Oil, etc., Co. v. Teel* 95 Tex. 586; 67 S. W. 545; 68 S. W. 779; *Gadbury v. Ohio, etc., Gas Co.*, 162 Ind. 9; 67 N. E. Rep. 259; 62 L. R. A. 895; *Gadbury v. Ohio, etc., Gas Co. (Ind. App.)*, 65 N. E. Rep. 289.

¹³⁰ *Westmoreland, etc., Gas Co. v. DeWitt*, 130 Pa. St. 235; 18 Atl. Rep. 724; 5 L. R. A. 731.

^{130a} *Consumers' Gas Trust Co. v. Littler*, 162 Ind. 320; 70 N. E. Rep. 363. Said the court: "It will not do to believe that the landowner would for the pittance of fifty cents per acre per annum have knowingly encumbered his land situate in the gas district, and thereby reduced its selling value, by transferring, for an indefinite period, and for speculative purposes, the right to enter at the pleasure of the grantee or his assign and mine the underlying gas or oil; or that he would have bargained away his prospects for larger gains from the gas and oil under his hand, with the knowledge that the same would be extracted through wells on other premises, and that his profits would be limited to the annual acreage rent during the process of extrac-

tion. It is as obvious as if expressed that the real intention of the parties was that the gas company or its assigns should, and within reasonable time, enter upon the premises and drill a well, and thereby test the existence or non-existence and continuance of the fluids in paying quantity." See also *Consumers' Gas Trust Co. v. Worth*, 163 Ind. 141; 71 N. E. Rep. 489; *Consumers' Gas Trust Co. v. Howard*, 163 Ind. 170; 71 N. E. Rep. 493.

Under oil and gas lease an agreement binding lessors to accept quarterly payment in lieu of drilling wells, lessors may require development after end of any quarter for which lessee has paid for delay on reasonable notice to lessee, and in event of failure to drill within reasonable time after notice, equity will cancel contracts on application of lessor. *Wilson v. Reserve Gas Co. (W. Va.)*, 88 S. E. 1075.

In oil and gas lease providing for forfeiture on failure to commence well within 90 days unless lessee pay a stipulated rental, payment at any reasonable time, or on reasonable demand, avoids forfeiture. *Bloom v. Pugh*, 98 Kan. 589; 160 P. 1135.

§ 205. Must pay rent although no oil on premises.

If the lease require the lessee to complete an oil well within a certain time, or thereafter pay a certain sum annually until a well is completed, it is no excuse for not drilling the well that the premises were worthless for oil, and for that reason a well was never completed. In passing on the case, the court said:

"I do not think, however, that the fact of there being no oil or gas on the land, no matter how soon found out, could avail the defendant. The lessors were entitled to insist that this fact should be made manifest in the very manner agreed upon, or to demand the sum stipulated to be paid for delay. The covenant on this subject is absolute and unqualified, and provides for the doing of nothing that is illegal and improbable. If a clear, positive covenant, like the one before us, to do a lawful thing or pay a certain sum of money for not doing it, can be evaded by showing that the performance of the act did not benefit the covenantee, it is hard to tell where we could properly stop in applying the rule. We might presently reach a point where an action for liquidated damages for breach of an agreement not to engage in a certain business within designated limits, might be defeated by proving that everyone conducting the same business in the neighborhood had been losing money, and, for reasons shown, would probably continue to do so. . . . That the contract may have proved a losing one to the lessee or his assignee, the defendant, is neither here nor there. To quote the popular saying, 'a contract is a contract' and no sufficient reason appears why the one under consideration should not be enforced."¹³¹

§ 206. Lessee must pay past rents.—Damages.

A forfeiture declared by the lessor does not release the lessee from the payment of rents or royalties or other sums that had matured at the time of the declaration of forfeiture. And the same is true in case of a surrender. "The lessees had the right to surrender the lease at any time, but such sur-

¹³¹ Springer v. National Gas Co., Baker v. Stone, 30 Ohio Cir. Ct. 145 Pa. St. 430; 22 Atl. Rep. 986; Rep. 724.

render was not a payment of what they then owed." In the case from which this quotation has just been made the lease provided that the lessee should commence a well within one month from the date of the lease, or in lieu thereof, pay the lessor two dollars per day until it was commenced, or surrender the lease. It was held that upon surrender of the lease that the payments contemplated were to be made up to the time of the surrender (although not as a condition of the surrender), and, when so made, they should be in full satisfaction for any damages by reason of the failure of the lessee to perform the conditions of the lease.¹³² But even here there arise cases where no obligation rests upon the lessee or contractor to pay rents past due. Thus a contract provided that "in case no well is completed within sixty days from this date, then this grant shall become null and void, unless second party pay at the rate of forty dollars for each year such commencement is delayed." The contract was to run for five years, "and as long as oil and gas can be found on said real estate in paying quantities or the rental is paid as provided in the contract." The contractor had reserved the right to cancel the contract at any time on the payment of one dollar. It was said that the contract was not a lease; that the contractor had not agreed to pay "any sum in the nature of rent; and, as the relation of landlord and tenant did not exist, and as there was no beneficial use or occupation, an action could not have been maintained on an implied agreement to pay."^{132a}

¹³² Bettman v. Shadle, 22 Ind. App. 542; 53 N. E. Rep. 662. See also Woodland Oil Co. v. Crawford, 55 Ohio St. 161; 36 Ohio Wkly. L. Bull. 231; 14 N. E. Rep. 1093; 34 L. R. A. 62; Scott v. Lafayette Gas Co., 42 Ind. App. 614; 86 N. E. Rep. 495; Lawson v. Kirchner, 50 W. Va. 344; 40 S. E. 344; Roberts v. Bettman, 45 W. Va. 143; 30 S. E. 95.

^{132a} Dill v. Frazee, 169 Ind. 53; 79 N. E. Rep. 971; Smith v. South Penn. Oil Co., 59 W. Va. 204; 53 S. E. Rep. 152; Ohio Oil Co. v. Detamore, 165 Ind. 243; 73 N. E. Rep. 906; Diamond Plate Glass Co. v. Curless, 22 Ind. App. 346; 52 N. E. 782; Hays v. Forest Oil Co., 213 Pa. 556; 62 Atl. Rep. 1072; United States v. Comet Oil & Gas Co., 187 Fed. 674.

§ 207. Lessor consenting to abandonment.

If the lessor consent to the abandonment by the lessee, he cannot thereafter insist that the lessee must pay the penalty or the rent stipulated for in the lease. Such was decided to be the case where a test well was drilled, which proved to be a dry hole, yielding neither gas nor oil, the lessee openly and publicly removing the machinery from the premises, abandoning all further operations on the premises; and the lessor, knowing that the well was a dry hole and that the premises had been abandoned, making no claim upon the lessor for any sum of money due under the lease for several years, the lessee waiving a written notice of forfeiture, and the lessor subsequently granting to another party an option to buy all the coal underlying the surface of the premises.¹³³

§ 208. Estoppel of lessor.

A lessor by his conduct may estop himself to declare a forfeiture. Such an instance is where a lessee is given to understand, before forfeiture incurred, that if a particular covenant in the lease is not performed on time there will be no forfeiture declared or enforced. Perhaps this might be put on the ground of waiver, although that term more properly applies to instances where the forfeiture has been incurred before the acts of waiver have taken place, yet preceding the declaration of forfeiture. Any act of the lessor that lulls the activity of the lessee, and upon which he has a right to rely, that takes place before a forfeiture is incurred, and which would not have been permitted by the lessee without such act of the lessor, may well be deemed to estop such lessor from insisting upon a forfeiture for a non-performance of the particular covenant of which lack of performance is complained and insisted upon by the lessor as cause for a forfeiture. It would be inequitable to permit a forfeiture under such circumstances.¹³⁴ But an estoppel to assert

¹³³ May v. Hazelwood Oil Co., 152 Pa. St. 518; 25 Atl. Rep. 565. See Stage v. Boyer, 183 Pa. St. 560; 38 Atl. Rep. 1035.

¹³⁴ Steiner v. Marks, 172 Pa. St.

400; 33 Atl. Rep. 695; New American Oil Co. v. Troyer, 166 Ind. 402; 76 N. E. 353; 77 N. E. 739; Hukill v. Myers, 36 W. Va. 639; 15 S. E. 151; Pyle v. Henderson, 65 W. Va.

one breach cannot be made to apply to another; as, for instance, if there is an estoppel to insist upon a forfeiture to commence a well within sixty days, it cannot be used to prevent a forfeiture for having failed to complete the well within five months.¹³⁵ An estoppel may also arise where the lessor, after forfeiture incurred, permits the lessee to expend considerable, or at least large, sums of money in developing the premises, knowing, or at least having good reasons to believe, that the lessee does not think a forfeiture will be enforced.¹³⁶ This is particularly true of the payment of rent on the precise day when due, which in point of time is not always regarded as of the essence of the contract. "There is a wide distinction even in equity between forfeiture for failure of punctual payment of money," said the court in one case, "where time is of the essence of the contract and where it is not. If parties choose to stipulate for matters as essential, it is not for courts to say they are not so, but in the absence of a clear agreement for materiality, courts will look into the nature of the transaction and be governed by the real bearing of the facts upon the intentions and rights of the parties."¹³⁷ If the lessor has prevented the lessee completing a well in time, he is estopped to declare a forfeiture for a failure to keep the covenant of the lease in that respect.¹³⁸

§ 209. Demand for compliance with lease.

If the lessee has made default, unless the lease provide otherwise, the lessor is not required to make a demand on him to comply with the lease, especially if he, and not the lessee, is in

39; 63 S. E. 762; *Steiner v. Marks*, 172 Pa. 400; 38 Atl. 695; *Kansas Natural Gas Co. v. Harris*, 79 Kan. 167; 100 Pac. 7; *Henderson v. Ferrell*, 183 Pa. 547; 38 Atl. 1018.

¹³⁵ *Cleminger v. Baden Gas Co.*, 159 Pa. St. 16; 28 Atl. Rep. 293.

¹³⁶ *Duffield v. Michaels*, 102 Fed. Rep. 20. Thus, where the conduct of the lessee in an oil lease had been such as to amount to an abandonment, but on re-entry by him, the lessor did not stand upon his objection, but acquiesced in the resump-

tion of operations, such acquiescence estopped the lessor to complain of the entry. *Bay State Petroleum Co. v. Penn Lubricating Co.*, 121 Ky. 637; 87 S. W. 1102; 27 Ky. Law Rep. 1133.

¹³⁷ *Lynch v. Versailles Fuel Gas Co.*, 165 Pa. St. 518; 30 Atl. Rep. 984. See *Northwestern Ohio, etc., Gas Co. v. Browning*, 15 Ohio Cir. Ct. Rep. 84; 8 Ohio Cir. Dec. 188.

¹³⁸ *Stahl v. Van Vleck*, 53 Ohio St. 136; 41 N. E. Rep. 35.

possession.¹³⁹ This is especially true if the lease authorizes in terms the lessor to re-enter without demand or notice.¹⁴⁰ Whether or not the lessor should make a demand on, or give notice to, the lessee to develop or operate the leased premises before declaring a forfeiture depends somewhat on the terms of the particular lease in question. Thus in one case it appeared that the landowner executed an oil lease, under which he was to receive a royalty of one-tenth of all the oil produced from the land; the lessee binding itself to begin prospecting within one year from the date of the lease, or, in lieu thereof, to pay an annual rent of \$16.00. In an action brought by the lessor to cancel a lease, on the ground that the lessee had not developed the premises, the defense was that he had accepted the rental for seven years, that the defendant was ready and able, and willing to drill and develop the land whenever the lessor elected to require him to do so, but that he had never notified the defendant to proceed with the development of the land, or that he would not accept the rent provided for in the lease. The court declined to cancel the lease, saying: "It is true, as said by counsel for appellant, that forfeitures are not generally favored by the law, but forfeitures which arise in gas and oil leases by reason of the neglect of the lessee to develop or operate the leased premises are rather favored because of the peculiar character of the product to be produced. Hence it has been found necessary to guard the rights of the landowner as well as public interest by numerous covenants, some of the most stringent kind, to prevent their land from being burdened by unexecuted and profitless leases incompatible with the rights of alienation and the use of the land. Forfeiture for non-development or delay is essential to private and public interest in relation to the use and alienation of property. Perhaps in no other business is prompt performance of contracts so essential to the rights of the parties, or delay by one party likely to prove so injurious to the other. This contract, however, can be so construed as to effectuate the intention of the parties in a manner that will do justice to the lessor as well as

¹³⁹ *Maxwell v. Todd*, 112 N. C. 677; 16 S. E. Rep. 926.

But this is not universally true, as will be seen in the chapter on procedure by the lessor when the

lessee has failed to exploit the land as implied in the terms of the case.

¹⁴⁰ *Island Coal Co. v. Combs*, 152 Ind. 379; 53 N. E. Rep. 452. See § 158.

the lessee without arbitrarily canceling it, as was done by the judgment of the lower court, and this result may be accomplished by requiring the lessor to give notice to the lessee that he will not accept the annual rentals and permit his land to remain idle and undeveloped, but will require the lessee to execute the contract according to the intention of the minds of the parties at the time it was made by commencing in good faith its development, and, if the lessee does not, within a year from the notice, in good faith commence a well on the premises, the lessor at the expiration of that time may have the lease forfeited. The lessor in this contract did not at any time exact or demand of the lessee that it commence operating for oil or gas, but accepted the annual rentals paid in full discharge of the obligations of the contract, although at the end of any rental period he might have declined to accept rent and required the lessee to begin operations for oil or gas."^{140a} But where the only consideration of the oil, gas and mineral rights in a large tract of land was \$1.00, and the payment one-eighth of the net proceeds from a sale for anything of value found, drilling to begin within two years; and the lessee had merely drilled a well to a vein of coal, and thereafter for years had done nothing more, it was held that the lessor, without notifying the lessee, could begin operations and not having acquiesced in the delay, could have the lease canceled, as an abandoned unilateral contract. The court distinguished the case just cited in the following language: "Appellant insists that the rule above announced should be applied in this case. But the case at bar is radically different from the Richardson case. In the Richardson case the lease provided for a royalty of one-tenth of the profits to the lessor, or an annual rental of \$16 in lieu thereof; and the rental was regularly paid and accepted as a satisfaction of the requirements of the lease. Under those facts the court held that, if the lessors in that case

^{140a} See Sec. 182. Monarch Oil, the courts cited Sec. 148 of the Gas & Coal Co., 124 Ky. 202; 99 last edition of this book, now § 172. S. W. 668; 30 Ky. Law Rep. 824;

preferred to require the lessees to develop the land, instead of paying the annual rental, they had the right to do so upon giving a reasonable notice of their election. That ruling was entirely proper under the facts of that case. In the case at bar, however, the royalty is the only consideration for the lease, and nothing whatever has been paid to the lessors, either by way of royalty or otherwise. Under the lease in this case it was optional with the lessees when, if ever, operations under the lease should be carried to a stage that would yield a royalty to the lessors. They could wait fifty years before doing anything after they had discovered the coal vein in 1902, and if the contract was a valid one, the lessors had no relief whatever. Such contracts have been held by this court to be unenforceable, on the ground that they are unilateral, and lack mutuality of obligation which is essential to the validity of contracts."^{140b}

^{140b} *Soper v. King*, 167 Ky. 332; 180 S. W. 46.

The court made the following quotation from *Berry v. Frisbie*, 120 Ky. 343; 86 S. W. 558; 27 Ky. Law Rep. 724. "Such contracts lack the mutuality essential to their validity. A unilateral executive contract is in law a *Nudum Pactum*, and is unenforceable. Where it is left to one of the parties to choose whether he will proceed or abandon it, neither can specifically enforce its execution in equity. *Litz v. Goosiling*, 93 Ky. 185; 19 S. W. 527; 14 Ky. Law Rep. 91; 21 L. R. A. 127; *Federal Oil Company v. Western Oil Co.*, 112 Fed. 273; *Marble Co. v. Ripley*, 10 Wall. C. 39; 19 L. Ed. 955. Nor is the recited condition of \$1.00 sufficient to uphold an action for the specific enforcement of a contract otherwise unsupported by a consideration. As was said in the *Federal Oil Co. v. Western Oil Co.*, *supra*: 'The consideration would be so trifling, com-

pared with the value of the leasehold interests as to shock the moral sense. The purpose of the contracting parties must have been the finding of oil or gas in paying quantities on which land, if to be found, and their being worked so as to make money for each party. That was the point where their minds met. The owner of the soil could not have dreamt that he was putting it out of his power to ever develop or have developed the mineral possibilities of his farm, nor, if minerals were found, that it would be left to the exclusive discretion of the other party whether they would be brought into marketable condition. Our construction of this contract is that, when accepted, as it was, within four months of its date, it bound the lessees to within two years from such acceptance to explore the land described by actually sinking a well or wells upon it. If oil or gas or coal were found therein in paying quantities, then

§ 210. Abandonment a question of intention.

Abandonment of a lease is a question of intention, and is to be determined only on an investigation of the facts. Mere lapse of time may not be sufficient to determine that question, but it may be "aided and strengthened by the acts and declarations of the tenant evincing the intention permanently to abandon."¹⁴¹

the lessees were bound to diligently work and operate same so as to bring the product to a present market, and so as to promptly yield to the lessor his royalty, and that, unless the lessees did so actually develop the land in question, and in good faith and diligence operate it, the lease should be deemed abandoned.' Parrish Fork Oil Co. v. Bridgewater Gas Co., 51 W. Va. 582; 42 S. E. 655; 59 L. R. A. 566."

The court cited the following cases: Huggins v. Daley, 99 Fed. 606; 44 C. C. A. 12; 48 L. R. A. 320; Sharp v. Behr, 117 Fed. 872; Gadbury v. Ohio & I. Consol. Natural & Illuminating Gas Co., 162 Ind. 13; 67 N. E. 259; 62 L. R. A. 899; Berl v. Kehoe, 130 La. 1026; 58 So. 864; Loveland v. Loughenry, 145 Wis. 67; 129 N. W. 650; 140 Am. St. 1068; Mansfield Gas Co. v. Alexander, 97 Ark. 172; 133 S. W. 837; Howerton v. Kansas Natural Gas Company, 81 Kan. 560; 106 Pa. 47; 34 L. R. A. (N. S.) 34; 82 Kan. 367; 108 Pac. 813; Florence Oil & Ref. Co. v. Orman, 19 Colo. App. 88; 73 Pac. 628; Young v. McIlhenny (Ky.), 116 S. W. 728; Eastern Kentucky M. & T. Co. v. Swann-Dry Lumber Company, 148 Kentucky 82; 146 S. W. 438; 46 L. R. A. (N. S.) 672; Killebrew v. Murray, 151 Ky. 345; 151 S. W. 662.

The court then made the follow-

ing quotation from the Swann-Dry Lumber Company's Case, *supra*: "Generally all leases of land for the exploration or development of minerals are executed by the lessor, in the hope and upon the condition either express or implied, that the land shall be developed for minerals; and it would be unjust and unreasonable, and contravene the nature and spirit of the lease, to allow the lessee to continue to hold under it any considerable length of time without making any effort at all to develop it according to the express or implied purpose of the lease."

The court concluded "Soper v. King, *supra*" as follows: "It will thus be seen that the case at bar does not come within the rule announced in the Richardson case (*supra*); but on the contrary, it is controlled by the Frisbie (*supra*) and similar cases, above cited."

¹⁴¹ Karns v. Tanner, 66 Pa. St. 297; Parrish Fork Oil Co. v. Bridgewater Gas Co., 51 W. Va. 583; 42 S. E. Rep. 655; 59 L. R. A. 566; Sult v. A. Hockstetter, 63 W. Va. 317; 61 S. E. Rep. 307; Garrett v. South Penn. Oil Co., 66 W. Va. 587; 66 S. E. 741; Smith v. Root, 66 W. Va. 633; 66 S. E. 1005; 30 L. R. A. (N. S.) 176; Phillips v. Hamilton, 17 Wyo. 41; 95 Pac. 846; Soaper v. King, 167 Ky. 121; 180 S. W. 46.

§ 211. Forfeiture a question for jury.

Usually whether or not there has been a forfeiture or abandonment is a question for the jury. Thus a lessee was to commence drilling a well within ninety days from the date of the lease, and "prosecute said drilling with due diligence to success or abandonment"; and it was provided that if oil or gas be not pumped or excavated in paying quantities on or before a certain date, then the lease was to be null and void; and the lessee began the work on time and prosecuted it continuously until five months after the date in the lease set for its forfeiture, when he withdrew the casing and left the premises for five months longer. He claimed that he had found oil in paying quantities, but admitted he had never pumped any from the well. In an action involving the validity of the lease, it was held that the lessee had no discretion to delay operations indefinitely, provided he produced oil or gas in paying quantities by the date fixed, but he was bound to exercise diligence during the whole period; and it was a question for the jury whether a forfeit had been incurred because of a lack of due diligence.¹⁴² A lease of certain premises provided that if no well had been begun and prosecuted with due diligence within four months it should be void. It was held not error to refuse to instruct the jury that if the lessee, before the termination of the lease, hauled lumber on the premises with the purpose to begin the well, such act was a beginning of the well within the terms of the lease; for the reason as the lessee had hauled lumber on the premises the day before the lease expired, it was not for the court to determine the question of forfeiture as a matter of law, but the question was one for the jury to decide, in connection with the testimony as to the general understanding among persons engaged in boring wells as to when a well was begun.¹⁴³ So

¹⁴² *Kennedy v. Crawford*, 138 Pa. St. 561; 27 W. N. C. 306; 21 Atl. Rep. 19; *Rynd v. Rynd Farm Oil Co.*, 63 Pa. St. 397; *Karns v. Tanner*, 66 Pa. St. 297; *Wesling v. Kroll*, 78 Wis. 636; 47 N. W. Rep. 943; *Nelson v. Eichel*, 158 Pa. St. 372; 33 W. N. C. 281; 27 Atl. Rep. 1103; *Rawlings v. Armel*, 70 Kan.

778; 79 Pac. Rep. 683; *Buffalo Valley Oil & Gas Co. v. Jones*, 75 Kan. 18; 87 Pac. Rep. 537.

¹⁴³ *Forney v. Ward*, 25 Tex. Civ. App. 443, 62 S. W. Rep. 108. See *Fleming Oil and Gas Co. v. South Penn. Oil Co.*, 37 W. Va. 645; 17 S. E. Rep. 203.

where, under a similar lease, the lessee, within the time drilling on the well was to be begun, commenced the construction of necessary machinery on the premises, and was engaged in seeking for contractors to do the work, the question whether the lessee had used due diligence in constructing the well was considered one for the jury.¹⁴⁴ Whether there has been an abandonment by the lessee is also a question for the jury.¹⁴⁵ If there be no dispute as to the acts done, and none with reference to the inference to be drawn from them, it is error to submit the question of forfeiture to the jury.¹⁴⁶

§ 212. Suit to cancel lease for non-development of territory.(a)

A court of equity has full power to entertain a suit to cancel a lease for neglect or refusal of the lessee to develop the premises leased. Thus where the lease was for twenty years, or so long as oil and gas should be found in paying quantities; and seven years had elapsed since the time fixed for drilling a test well, it was held that a court of equity would cancel the lease, the presumption being that the lessee had abandoned it.¹⁴⁷ But if the

¹⁴⁴ Lane v. Gordon, 18 N. Y. App. Div. 438; 46 N. Y. Supp. 57; Heinouer v. Jones, 159 Pa. St. 228; 28 Atl. Rep. 228.

¹⁴⁵ Bartley v. Phillips, 165 Pa. St. 325; 30 Atl. Rep. 842.

¹⁴⁶ McKnight v. Kreutz, 51 Pa. St. 232.

A suit to quiet title lies after forfeiture incurred. American Window Glass Co. v. Williams, 30 Ind. App. 685, 66 N. E. Rep. 912; Gadbury v. Ohio, etc., Gas Co., 162 Ind. 9, 67 N. E. Rep. 259; 62 L. R. A. 895; Gadbury v. Ohio, etc., Gas Co. (Ind. App.), 65 N. E. Rep. 289.

(a) §§ 855, 857, 863, note 32.

¹⁴⁷ Crawford v. Ritchey, 43 W. Va. 252; 27 S. E. Rep. 220; Bettman v. Shadle, 22 Ind. App. 542; 53 N. E. Rep. 662; Cowan v. Bradford Iron Co., 83 Va. 547; 3 S. E. Rep. 120; Southern Oil Co. v. Wilson, 22 Tex. Civ. App. 534; 56 S. W. Rep. 429; Edwards v. Iola Gas Co., 65

Kan. 362; 69 Pac. Rep. 350; Barnsdall v. Boley, 119 Fed. Rep. 191; Parish Fork Oil Co. v. Bridgewater Oil Co., 51 W. Va. 583; 42 S. E. Rep. 655; Gadbury v. Ohio, etc., Gas Co., 162 Ind. 9, 67 N. E. Rep. 259; Kellar v. Craig, 126 Fed. Rep. 630; Zeller v. Book, 28 Ohio Cir. Ct. Rep. 119; Murray v. Barnhart, 117 La. 1023; 42 So. Rep. 489; Brewster v. Lanyon Zinc Co., 140 Fed. Rep. 801; 72 C. C. A. 213; J. M. Guffey Petroleum Co. v. Oliver (Tex. Civ. App.), 79 S. W. Rep. 884. § 872.

Equity will not cancel a lease before the expiration of the terms for mere delay in paying rent or commutation money and failure to commence operations at the stipulated time, when the lessee is ready and willing to pay the rent and perform the covenant to operate the mines. Pheasant v. Hanna, 63 W. Va. 613; 60 S. E. Rep. 618. §§ 902, 863, note 32.

lessor is in actual possession, and the terms of the lease are such as to render the lease void if any particular covenant is not kept, then the lessor cannot maintain an action in equity to cancel the lease, although he may sue in assumpsit for arrears of royalty, or, possibly in ejectment.¹⁴⁸ Unusual delay will work a forfeiture of the right to maintain a suit to cancel a lease, where the ground of forfeiture is a failure to pay royalties.¹⁴⁹ In an action to cancel the lease for non-development or failure to carry on mining operations, it is proper to show that the lessee had failed to furnish periodical statements of the oil produced, as required by the contract; that he is insolvent, and creditors are seizing the mining apparatus, and that the property is likely to be destroyed or injured by discontented and unpaid workmen.¹⁵⁰ Ejectment lies at the instance of the lessor or his grantee to recover possession, without making any re-entry, and without demanding the rent or royalties due and un-

Where a contract has been violated by not doing what was covenanted to be done within the time stipulated, a putting in default is not a prerequisite to a suit to rescind, but only to the recovery of future damages. *Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Co.*, 44 So. 481; 119 La. 793.

¹⁴⁸ *Hoch v. Bass*, 133 Pa. St. 328; 19 Atl. Rep. 360.

¹⁴⁹ *Drake v. Lacoe*, 157 Pa. St. 17; 27 Atl. Rep. 538. The delay was twelve years. See *Core v. N. Y., etc., Co.*, 52 W. Va. 276; 43 S. E. Rep. 128. § 863, note 29; § 872.

An action to cancel the lease lies, although the lessor can obtain compensation in damages. *Powers v. Bridgeport*, 238 Ill. 397; 87 N. E. Rep. 381.

¹⁵⁰ *Sunday Lake Mining Co. v. Wakefield*, 72 Wis. 204; 39 N. W. Rep. 136. In this case it was also held that a court having jurisdiction of the parties could grant re-

lief from a forfeiture, though the mines were situated in another State, and that the court could restore the possession of them.

The fact that it is questionable whether oil wells on land held under a lease operative only so long as oil or gas should be found in paying quantities will ever yield a reasonable profit on the investment is not sufficient ground for vacating the lease; the lessee is the sole judge on this question, and as long as he can make a profit therefrom, he will be permitted to do so. *Keller v. Book*, 28 Ohio Cir. Ct. R. 119.

See Sec. 902. While primarily the question of the expediency of further developing land on which oil has been found in paying quantities, is to be determined by the lessee, yet the ultimate determination of the lessee's obligation rests with the court. Merely because the lessor believed it expedient to further develop the leased premises will not entitle him to divest the lessee of

paid.¹⁵¹ So will a suit to quiet title.¹⁵² The lessee cannot stay the forfeiture proceedings, at least after notice of forfeiture given, by an appeal to a provision in the lease whereby certain questions were to be submitted to arbitration.¹⁵³ If the premises in part have been developed, the suit cannot be maintained for the forfeiture of the entire lease, but must be for damages.¹⁵⁴ Where the time of the payment of the rental is not a part of the essence of the lease, equity may excuse default in its payment, and will not declare a forfeiture and cancellation of the lease, if it would be inequitable so to do.¹⁵⁵ For a failure to protect the lines of a lease, the remedy is an action for damages, and not a forfeiture.^{155a} A lessor asking a cancellation of the lease must come with clean hands.^{155b}

§ 213. Relief from forfeiture.

Equity has power to grant relief from a forfeiture incurred where the lessee has not in fact been guilty of any act of neglect, although he has not carried out the provisions of the lease to their full extent.¹⁵⁶ Such was the case of the failure to de-

his rights already acquired. *Caddo Oil, etc., Co. v. Producers' Oil Co.*, 134 La. 701; 64 So. 684.

¹⁵¹ *Boys v. Robinson* (N. J. L.), 38 Atl. Rep. 813.

¹⁵² *Island Coal Co. v. Combs*, 152 Ind. 379; 53 N. E. Rep. 452.

¹⁵³ *Acme Coal Co. v. Stroud*, 5 Lack. Leg. News (Pa.) 169.

¹⁵⁴ *Harness v. Eastern Oil Co.*, 49 W. Va. 232; 38 S. E. Rep. 662. Suit to cancel so much of the lease as pertains to the undeveloped premises will lie. *Coffinberry v. Sun Oil Co.*, 68 Ohio St. 488; 67 N. E. Rep. 1069; *McGraw Oil & Gas Co. v. Kennedy*, 65 W. Va. 595; 64 S. E. Rep. 1027; 28 L. R. A. (N. S.) 959; *Doddridge County Oil & Gas Co. v. Smith*, 154 Fed. Rep. 970.

¹⁵⁵ *Edwards v. Iola Gas Co.*, 65 Kan. 362; 69 Pac. Rep. 350.

A court will not cancel the lease if at the time of the trial the lessee has drilled the full number of wells

and is still in possession, when the charge is an abandonment. *Keller v. Craig*, 126 Fed. Rep. 630; *Logansport & W. Va. Gas Co. v. Ross*, 32 Ind. App. 638; 70 N. E. Rep. 544.

The complaint must aver that the plaintiff is the owner of the ground upon which rests the lease to be cancelled. *Indiana Natural Gas & Oil Co. v. Sexton*, 31 Ind. App. 575; 68 N. E. Rep. 692. § 902.

^{155a} *Doddridge Co. Oil & Gas Co. v. Smith*, 154 Fed. 970.

^{155b} *Indiana Oil, etc., Co. v. McCrory*, 42 Okl. 136; 140 Pac. 610.

¹⁵⁶ *Edwards v. Iola Gas Co.*, 65 Kan. 362; 69 Pac. Rep. 350; *Headley v. Hoopengartner*, 60 W. Va. 626; 55 S. E. 144; *Eastern Oil Co. v. Coulehan*, 65 W. Va. 531; 64 S. E. 826; *South Penn. Oil Co. v. Edgell*, 48 W. Va. 348; 37 S. E. 596; *Hukill v. Myers*, 36 W. Va. 639; 15 S. E. 151; *Doddridge County Oil & Gas Co. v. Smith*, 154 Fed. Rep. 970;

liver the lessor his share of oil where there was such an extraordinary and unexpected flow as to make a delivery impracticable. If it would be unconscionable to allow a forfeiture to be enforced, a court of equity will grant relief against such forfeiture.¹⁵⁷ If a forfeiture for non-payment of money, or for failure to perform any other act, will admit of accurate and full compensation, and is provided as a mere penalty with a view to enforce a performance of another and principal obligation, a court of equity will grant relief against it, and will not permit it to be used for a different and inequitable purpose. Thus a lease provided for rent payable for delay in drilling a well; but as no time was specified for the payment of rent, it fell due by operation of law at the end of each year. For several years, instead of drilling a well, the lessee paid the rent. He then began drilling a well, and at great expense obtained oil in paying quantities. By oversight the lessee failed to pay an annual rent when it fell due; and six days after default the lessor notified him to remove his machinery, and the next day declared a forfeiture. During these six days the lessee spent considerable money on the leased premises in their development. The court considered the lessee's action lacked that promptness that was essential to declare a forfeiture, that his action was unconscionable, and that a forfeiture could not be enforced.¹⁵⁸ If the principal thing is to

Pheasant v. Hanna, 63 W. Va. 613; 60 S. E. Rep. 618 (relief from a mere technical forfeiture); *Pyle v. Henderson*, 65 W. Va. 39; 63 S. E. 762; *Gulley v. Smith*, 237 U. S. 101; 35 Sup. Ct. 526; 59 L. Ed. 856, reversing 202 Fed. 106; 120 C. C. A. 436; *Shaffer v. Marks*, 241 Fed. 139.

¹⁵⁷ *Thompson v. Christie*, 138 Pa. St. 230; 20 Atl. Rep. 934; 11 L. R. A. 236; *Eastern Oil Co. v. Coulahan*, 65 W. Va. 531; 64 S. E. 836; *South Penn. Oil Co. v. Edgell*, 48 W. Va. 348; 37 S. E. 596; *Newton v. Kemper*, 66 W. Va. 130; 68 N. E. 102; *Smith v. People's Nat. Gas Co. (Pa.)*, 101 Atl. 739; *Oil Creek R. R. Co. v. Atlantic & G. Western*,

57 Pa. St. 65; *Dowey v. Gooch*, 240 Fed. 527.

¹⁵⁸ *Lynch v. Versailles Fuel Gas Co.*, 165 Pa. St. 518; 30 Atl. Rep. 984. This is especially true where great loss, wholly disproportionate to the injury occasioned by the breach of the contract would otherwise result to the lessee negligently, but not fraudulently, in default. *South Penn. Oil Co. v. Edgell*, 48 W. Va. 348; 37 S. E. Rep. 596; 86 Am. St. 43. Such would be the case where the lessor entered for a failure to pay rent on time, when the payment was hindered by his acts. *Young v. Ellis*, 91 Va. 297; 21 Atl. Rep. 480.

sink a well, then relief in equity will not be given upon the tender of the periodical and unpaid rental, where neglect to sink the well cannot be compensated for in damages.¹⁵⁹ Relief can be afforded by a court having jurisdiction of the parties, although the premises lie in another State; and the court can restore possession of them to the lessee.¹⁶⁰ If the time of payment of the rental is not in express terms or necessary implication made the essence of the lease, equity may excuse a default in payment, and will not declare a forfeiture and cancellation of it in a case where it would be inequitable and unconscionable.¹⁶¹ Equity, however, will not grant relief against a forfeiture incurred where the provision of the lease violated is of the essence of the contract and justice would be promoted by the forfeiture stipulated for.^{161a} It does not necessarily follow that the lessee will not be entitled to relief because there is a surrender clause in his lease, when the action is brought in equity in the Federal Courts.^{161b}

§ 214. Time to avoid forfeiture.

Usually courts will give some time after the date of forfeiture fixed in the lease to perform the covenant on which the forfeiture depends. Thus where a lease provided for the drilling of

¹⁵⁹ *Hukill v. Guffey*, 37 W. Va. 425; 16 S. E. Rep. 544.

¹⁶⁰ *Sunday Lake Mining Co. v. Wakefield*, 72 Wis. 204; 39 N. W. Rep. 136.

¹⁶¹ *Edwards v. Iola Gas Co.*, 65 Kan. 362; 69 Pac. Rep. 350.

^{161a} *Dill v. Frazee*, 169 Ind. 53; 79 N. E. Rep. 971. Equity will not relieve from a forfeiture of an oil and gas lease for non-performance of certain conditions occasioned by fraud.

Time was held to be of the essence of the condition in an oil and gas lease, making it forfeitable on failure to perform certain acts. Unreasonable delay, under the circumstances, was held to bar relief in equity from the forfeiture of the

lease. Laches forbids delay in the assertion of a claim for relief from forfeiture of a lease, with intent to claim or abandon according to the event. *Westerman v. Dinsmore*, 68 W. Va. 594; 71 S. E. 250.

Precedent conditions must be literally performed and even a count of chancery will never vest an estate, when, by reason of a condition precedent, it will not vest in law. It cannot relieve from the consequences of a condition precedent unperformed. *Paraffine Oil Co. v. Cruce (Okla.)*, 162 Pac. 716.

^{161b} *Guffey v. Smith*, 237 U. S. 101; 35 Sup. Ct. 526; 59 L. Ed. 855, reversing 202 Fed. 106; 120 C. C. A. 436; *Shaffer v. Marks*, 241 Fed. 139. See Sec. 125a.

wells within a stated time, or payment of a yearly sum in advance, it was held that the lessor could not declare a forfeiture immediately at the termination of a year for which such payment had been made in, because no wells had been drilled, even though he had the right to refuse payment for a succeeding year; for the lessee had a right to a reasonable time after the expiration of the year paid for to drill a well and operate the premises.¹⁶² So, in a case of limitation. Thus where a lease was given for five years and as much longer as gas and oil was found in paying quantities, on the failure of a well which had produced gas in paying quantities for a number of years, and for which the rental had been promptly paid, it was held that the lessee was entitled to a reasonable time to drill at other locations to find gas or oil in paying quantities, and during such time and for such purposes the lease continued in force.¹⁶³

§ 215. Lessee cannot recover premises after forfeiture.

If the lessee has been ousted for a failure to keep the covenants of the lease, he cannot recover possession.¹⁶⁴ A part performance will not enable him to recover possession.¹⁶⁵

§ 216. Reimbursement for expenses.

A lessee who has forfeited his lease has no right to be reimbursed for his expenses disbursed in attempting to develop the land.¹⁶⁶ And if it is an oil lease, but gas is found, the lessee has no equity to be reimbursed for the expense of drilling the

¹⁶² *Northwestern Natural Gas Co. v. Browning*, 15 Ohio Cir. Ct. Rep. 84; 8 Ohio C. D. 188.

¹⁶³ *Blair v. Northwestern, etc., Co.*, 12 Ohio Cir. Ct. Rep. 78; 5 Ohio C. D. 620.

A court of equity in a suit to enjoin operations and quiet title of the lessor under an expired gas and oil lease and extension thereof will grant the relief sought; but, lessees having made an effort to complete a first well within the terms although not such excusable delay as

to extend the lease upon the whole premises, equity will permit the completion thereof for the purpose of ascertaining the results of the work, and apportion the costs between the parties. *Hollister v. Vandergrift*, 30 Ohio Cir. Ct. R. 759.

¹⁶⁴ *Oliver v. Goetz*, 125 Mo. 370; 28 S. W. Rep. 441.

¹⁶⁵ *Kreutz v. McKnight*, 53 Pa. St. 319.

¹⁶⁶ *Palmer v. Truby*, 136 Pa. St. 556; 20 Atl. Rep. 516.

well, out of the fund produced by the sale of the gas.¹⁶⁷ But if the lease may be determined at the will of either party to it, then the lessor must reimburse the lessee by a payment of the value of all labor done and services rendered by the lessee.^{167a} If the lessee in good faith had drilled a well on land covered by an option lease, then he is entitled to reimbursement from the lessor; but his right to it is determined from all the facts and his personal belief that he acted in good faith is not conclusive of his right to a recovery.^{167b}

§ 217. Removal of fixtures and machinery.(a)

When the lease is declared forfeited by the lessor, the lessee has a right to remove the fixtures without the right being reserved in the lease.¹⁶⁸ And if the right to remove the buildings, fixtures and machinery be reserved in the lease, the right to do so cannot be disputed. Thus where the lease expressly provided that the lessee should have such right of removal "unless all right thereto" had been "forfeited by a forfeiture" of the lease, or forfeiture for non-payment of the royalty, it was held not to deprive the lessees of the right to remove the buildings

¹⁶⁷ *Allen v. Palmer*, 136 Pa. St. 556; 26 W. N. C. 514; 20 Atl. Rep. 516; *Palmer v. Truby*, 136 Pa. St. 556; 20 Atl. Rep. 516.

^{167a} *J. M. Guffey Petroleum Co. v. Oliver* (Tex. Civ. App.), 79 S. W. Rep. 884. Where an issue turns upon whether a license to mine coal was in proper form and properly given, the question as to what money was expended by the licensee in the development of the mine is not relevant, if it appears that this expenditure was a necessary incident of the license. *Gearhart v. Gwinn*, 32 Pa. Super Ct. 567.

^{167b} *Lee v. Conley*, 160 Ky. 91; 169 S. W. 575.

(a) § 894.

¹⁶⁸ *Cassell v. Crothers*, 193 Pa. St. 359; 44 Atl. Rep. 446. *Siler v. Globe Window Glass Co.*, 21 Ohio Cir. Ct. Rep. 284. *Schertzer v.*

Myers, 82 Kan. 275; 108 Pac. Rep. 105. The fixtures must be removed within a reasonable time after forfeiture. *Gartlan v. Hickman*, 56 W. Va. 75; 49 S. E. 14; 67 L. R. A. 694; *Shellar v. Shivers*, 171 Pa. 569; 33 Atl. 95 (four years too long); *Perry v. Aeme Oil Co.*, 44 Ind. App. 207; 8 N. E. 859 ("at any time," means with a reasonable time). What is a reasonable time is determined upon the facts of each particular case. *Gartlan v. Hickman*, *supra*. See *Shellar v. Shivers*, 171 Pa. St. 569; 35 Atl. 95. See § 653.

But it is not error for the court to refuse to allow the lessee to remove the casings, if the casing cannot be removed without destroying the wells. *Powers v. Bridgeport Oil Co.*, 238 Ill. 397; 87 N. E. Rep. 381.

and other personal property which he had put on the lease, within a reasonable time.¹⁶⁹ The right of the lessee under an express reservation of the right to remove buildings and machinery, has a right to do so, irrespective of any controversy as to whether or not there is a legal right to abandon the lease by reason of an alleged failure on his part to complete the work of development.¹⁷⁰ If the lessee is refused the privilege of removing his buildings and machinery, his remedy as to such buildings and machinery is an action for conversion and not an action of ejectment.¹⁷¹ All fixtures, buildings and machinery must be removed within a reasonable time after notice of forfeiture given him by the lessor,¹⁷² or else they will be deemed abandoned, and the lessor may take possession of them for his own benefit. The lessee, where he has not drilled a well that yields oil or gas in paying quantities, and for that reason has abandoned it, has a right to draw and remove the tubing, casing, and drive pipe from the well at any time prior to the expiration of his lease. These instruments are regarded as trade fixtures, and are not governed by law pertaining to leases for agricultural pursuits.¹⁷³ But if the lease provide that if the lessee

¹⁶⁹ *Mickle v. Douglas*, 75 Ia. 78; 39 N. W. Rep. 198. *Howerton v. Gas Co.*, 81 Kan. 553; 106 Pac. 47.

¹⁷⁰ *Patterson v. Hausbeck*, 8 Pa. Super Ct. Rep. 36. In a contest between a prior lessor and a subsequent one, the latter, on a failure to maintain his rights, has a right to remove such fixtures as he has placed on the premises. *Linden Oil Co. v. Jennings*, 207 Pa. 254; 56 Atl. 1074.

¹⁷¹ *Cassell v. Crothers*, *supra*.

¹⁷² *Mickle v. Douglas*, *supra*. Eight months, on abandonment, has been held to be a reasonable time. *Standard Oil Co. v. Barlow* (La.), 54 So. 627.

¹⁷³ *Siler v. Globe Window Glass Co.*, 21 Ohio Cir. Ct. Rep. 284; 11 Ohio C. D. 784. Ejectment by the lessee does not lie to obtain possession of the premises in order to

remove the fixtures; but the court will direct judgment in favor of the lessor without prejudice to the lessee's right to maintain an action against the lessor for taking and appropriating the fixtures of the lessee. *Cassell v. Crothers*, 193 Pa. 359; 44 Atl. 446.

Though a party invading, with notice, the right of another under a lease to explore premises for oil and gas, may be enjoined, and forfeits whatever work he has done and material which cannot be taken away without injury to what has been done, he will be permitted to remove machinery or materials used in drilling wells or in pumping, conveying, or storing oil, not being a part of the wells themselves. *Gillespie v. Fulton Oil & Gas Co.*, 88 N. E. 192; 239 Ill. 326.

abandon the premises while there is a well furnishing gas sufficient for the lessor's residence on the premises, when he abandons the premises the lessor must leave the well in a condition to be used by the lessor, and he cannot remove the pipe, thereby cutting off the supply of gas to the residence, whether or not such pipe be personal property.^{173a} The lessee may remove the pipe he has put in the land.^{173b}

§ 218. Damages instead of declaring a forfeiture.

Instead of declaring a forfeiture, the lessor may waive it, affirm the continuance of the lease, and recover the amount specified in such lease as damages for a failure to comply with its terms.¹⁷⁴ If the lessees do not covenant to pay rent or develop the mine, but the lease contains a provision that the lease shall become void and all rights cease unless a well should be completed within a specified period of time, or unless the lessee pay rent at a certain rate per month or year in advance, the failure to explore for oil will merely work a forfeiture of the lease and not impose any pecuniary liability on the lessee.¹⁷⁵

^{173a} *Ohio Oil Co. v. Griest*, 30 Ind. App. 84; 65 N. E. 534.

^{173b} *Standard Oil Co. v. Barlow* (La.), 74 So. 627. A lease provided that the lessee should not remove the casing from the wells without the written consent of the owner, before abandonment; and a statute there and then in force provided that upon abandonment the owner should withdraw the casing. It was held that the provision in the lease was not void. *Johnson v. Hinkel* (Cal. App.), 154 Pac. 487.

¹⁷⁴ *Springer v. Citizens' Natural Gas Co.*, 145 Pa. St. 430; 22 Atl. Rep. 986, following *Ray v. Gas Co.*, 138 Pa. St. 576; 20 Atl. Rep. 1065; *Carr v. Huntington L. & F. Co.*, 33

Ind. App. 1; 70 N. E. Rep. 552; *Dix River Barytes Co. v. Pence* (Ky.), 123 S. W. Rep. 263; *Steel v. People's Oil & Gas Co.*, 147 Ill. App. 133; *Powers v Bridgeport Oil Co.*, 238 Ill. 397; 87 N. E. Rep. 381; *South Penn. Oil Co. v. Edgell*, 48 W. Va. 348; 37 S. E. Rep. 596; *Perry v. Aeme Oil Co.*, 44 Ind. App. 207; 88 N. E. Rep. 859, reversing 80 N. E. Rep. 174.

¹⁷⁵ *Glasgow v. Chartiers Oil Co.*, 152 Pa. St. 48; 25 Atl. Rep. 232; affirming *Glasgow v. Griffith*, 22 Pittsb. L. J. (N. S.) 181; *Hays v. Forest Oil Co.*, 213 Ill. 556; 62 Atl. Rep. 1072; *Dill v. Frazee*, 169 Ind. 53; 79 N. E. Rep. 971.

CHAPTER VI.

ASSIGNMENT AND SUBLETTING OF LEASE.

- § 219. Lessor.—Lessee.
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- § 221. Assignee cannot take advantage of default in lease.
- § 222. Refusing consent to assignment.
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- § 232. Assignee's liability broadened by terms of assignment or by outside contract.
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- § 240. Trustee of lessee and not his *cestuis que trustent* liable.
- § 241. *Cestuis que trustent* may be liable.
- § 242. Liability of assignee to his assignor.
- § 243. Assignor liable on account of lease as a surety.
- § 244. Sublease.—Liability of sublessee.
- § 245. Ejectment.
- § 246. Lessee denying landlord's title.
- § 247. Liability of a trustee assigning lease.
- § 248. Prior lease or contract by lessor.—Lessee as an innocent purchaser.
- § 249. Lessee impliedly covenanting not to assign lease.—Reassignment.

- § 219. Lessor.—Lessee.

As a general rule, a lessor may assign his right to an interest in a lease he has given on his real estate; or he may convey the realty itself which would usually carry his rights in the lease.

And also, as a general rule, the lessee may assign the lease he has received; or if he has a freehold interest under it, he may convey by deed his freehold interest.^a Where a lease must be in writing, the assignment of the lease must also be in writing.^b

§ 220. Interest assignee secures.

The assignee secures just such interest as his assignor had at the time of the assignment—at least that is the general rule, but, under special circumstances, he may be entitled to assume the role of a purchaser for value without notice of the rights of others.¹ If he have notice of the rights of a prior lessee, he

^a Under the Civil Code of Louisiana a contract to explore mineral land is assignable, though it makes no mention of assigns or of the right to assign. *Anse La. Butte Oil & M. Co. v. Babb*, 122 La. 415; 47 So. Rep. 754; and so is a lease giving the lessee a subsisting estate. *Chandler v. Hart* (Cal.), 119 Pac. 516.

A general assignment of "all live leases" belonging to the assignors carries a lease, not shown on the lease register of the lessor (a corporation), which purported to show all its live leases though it may be included in a bunch of leases marked "abandoned leases," and did not come to the knowledge of the assignee until after the transfer was consummated. *Indianapolis Gas Co. v. Pierce*, 36 Ind. App. 571; 76 N. E. Rep. 173; *Indianapolis Gas Co. v. Rayle*, 36 Ind. App. 706; 76 N. E. Rep. 176; *Carnegie Nat. Gas Co. v. South Penn. Oil Co.*, 56 W. Va. 402; 49 S. E. 548. See also *Anse La. Butte (La. Danois) Oil & M. Co. v. Babb*, 122 La. 415; 47 So. Rep. 754.

An owner of oil and gas leases covering a large tract of land assigned all his gas rights to another by a written contract, and entered

into a contract with the assignee providing that the parties thereto should have a right to operate said territory under their respective interests, and, should the owner of leases develop a gas well, the gas company should have the privilege of having such well transferred to it on payment of the cost of building it, and, if the gas company should develop an oil well, the assignee should have the privilege of having the well transferred to him on paying the actual cost thereof, each party to have 30 days in which to test any such well built by the other. It was held that on developing gas in paying quantities in drilling for oil and the election of the gas company within the time limited to pay the cost of drilling and the other expenses, the party drilling it must deliver possession to the gas company. *Carnegie Natural Gas Co. v. South Penn. Oil Co.*, 56 W. Va. 402; 49 S. E. 548.

^b *Beckett-Iseman Oil Co. v. Backer*, 165 Ky. 818; 178 S. W. 1084.

¹ *Thompson v. Christie*, 139 Pa. St. 230; 20 Atl. Rep. 834; 11 L. R. A. 236.

Where a new oil and gas lease was taken by one of two prior

takes no greater rights than his assignor had acquired.² If the lease provide for a forfeiture under certain conditions, the assignee must at his peril ascertain whether or not a forfeiture has been incurred.³ The assignee is liable for the taxes on all improvements he places on the leasehold premises.⁴ And this is true where the several owners of a lease have so conducted themselves as to turn their several interests into a partnership.⁵

lessees, granting to him, without reservation or limitation, the exclusive right to enter and bore for oil and gas, his assignment of the new lease vested in the assignee all the assignor's right as lessee under either of the leases, and barred the assignor's right of action as co-lessee in the original lease against his assignee, or any subsequent assignee of the new lease. *Garrett v. South Penn. Oil Co.*, 66 W. Va. 587; 66 S. E. 781.

If there be litigation concerning the lease, the assignee is chargeable with notice of it. *Pittinger v. Ramage*, 40 Ind. App. 486; 82 N. E. Rep. 478.

²*Henderson v. Ferrell*, 183 Pa. St. 547; 41 W. N. C. 404; 38 Atl. Rep. 1018; *Simons v. Van Ingen*, 86 Pa. St. 330; *In re Huddell*, 16 Fed. Rep. 373; *Caley v. Portland (Colo.)*, 71 Pac. Rep. 892; *Colorado, etc., Co. v. Pryor*, 25 Colo. 540, 549; 57 Pac. Rep. 51; *Moore v. Sawyer*, 16 Fed. Rep. 826; *Bartley v. Phillips*, 199 Pa. 175; 36 Atl. 217; *Hicks v. Gas Co.*, 207 Pa. 570; 57 Atl. 55; *Pyle v. Henderson*, 65 W. Va. 39; 63 Pa. 762; *Compton v. People's Gas Co.*, 75 Kan. 572; 89 Pac. 1029; 10 L. R. A. (N. S.) 758; *National, etc., Co. v. Teel*, 95 Tex. 586; 67 S. W. 545; 68 S. W. 797; *Gillespie v. Fulton Oil & Gas Co.*, 236 Ill. 188; 86 N. E. 215.

When a lessee segregates the lease by assigning to another all

rights thereunder as to a distinct part of the land, a discovery of oil on the part assigned gives the lessee a vested right to produce oil on the part retained, though he has taken no possession of that part. *Harris v. Michael*, 70 W. Va. 356; 73 S. E. 934.

³*Carnegie Natural Gas Co. v. Philadelphia Co.*, 158 Pa. St. 317; 27 Atl. Rep. 951; *Aderhold v. Oil Well Supply Co.*, 158 Pa. St. 401; 28 Atl. Rep. 22; *Bartley v. Phillips*, 179 Pa. 175; 36 Atl. 217.

⁴*In re Huddell*, 16 Fed. Rep. 373.

⁵*Brown v. Beecher*, 120 Pa. St. 590; 15 Atl. Rep. 608.

A verbal transfer, followed by a change of possession, is probably a valid transfer of the lessee's interest. *Lockhart v. Rollins*, 2 Idaho 503; 21 Pac. Rep. 413.

Under Ohio Rev. St. § 4112a, providing that an unrecorded lease of any interest in land, whereby a right is given to operate a natural gas and petroleum plant, shall have no force except as between the parties, until it is filed for record, unless the person claiming thereunder is in actual possession, an assignment, duly executed by an oil company, of all its property for the benefit of creditors, which is duly recorded, is entitled to *priority* over a transfer of the leasehold estate of the oil company to a bank for the purpose of securing it for money already advanced and to be ad-

§ 221. Assignee cannot take advantage of default in lease.

If a default has been made in carrying out the provisions of the lease, whether made by the lessee or the assignee, neither such lessee nor his assignee can urge the default as an excuse for not carrying out its provisions; for such a provision "inures to the benefit of the lessor, and is not effective in behalf of the lessee, unless the lessor so elects."⁶ But the assignee of an oil option is not bound by the fraud of the assignor in procuring the contracts, though the grantors are in possession, and the rights claimed under the option are consistent with such possession.^{6a}

§ 222. Refusing consent to assignment.

If the lease of oil or mining land contain a covenant prohibiting an assignment without the consent of the lessor, such consent cannot be unreasonably refused, or refused to a person of responsibility and respectability. The lessor may reasonably refuse to give his consent to an assignment to a corporation which does not take it with the intention to operate the land, for such corporation is not a person of responsibility and respectability within the meaning of the covenant in the lease, and that, too, even though there be no covenant to operate works already on the lease.⁷

vanced, where such transfer is not recorded and the bank has not taken possession of the property transferred. *Keystone Bank v. Union Oil Co.*, 25 Ohio Cir. Ct. R. 464; *Tucker v. Watts*, 25 Ohio Cir. Ct. Rep. 320.

⁶ *Edmonds v. Mounsey*, 15 Ind. App. 399; 44 N. E. Rep. 196; *Wills v. Mfg., etc., Co.*, 130 Pa. St. 220; 18 Atl. Rep. 721; *Ray v. Western, etc., Gas Co.*, 138 Pa. St. 576; 20 Atl. Rep. 1065; 12 L. R. A. 290; *Creveling v. West End Iron Co.*, 51 N. J. L. 34; 16 Atl. Rep. 184; *Cochran v. Pew*, 159 Pa. St. 184; 28 Atl. Rep. 219; *Compton v. People's Gas*

Co., 75 Kan. 572; 89 Pac. 1029; 10 L. R. A. 758.

It cannot be said that the assignment is without consideration because it was made at a time the assignor had a right to declare a forfeiture of the lease; for the assignor (the owner of the land) may waive his right to forfeit the lease. *Shannon v. Mastin* (Mo. App.), 108 S. W. Rep. 1116.

^{6a} *Natural Oil, etc., Co. v. Teel*, 95 Tex. 586; 67 S. W. 545; 68 S. W. 979.

⁷ *Harrison v. Barrow*, 63 L. T. Rep. 834.

The fact that the assignee of a

§ 223. Proof of assignment.

He who claims that a lease was assigned has the burden to show an assignment in accordance with his claim;^{7a} but he need not show it by direct evidence;^{7b} thus, in the case just cited the leases in question were in the defendant's possession when the plaintiff met its president to execute contracts for drilling wells in the land covered by the leases, and the contracts entered into recognized that the leases were held by the defendant by assignment; this was held to be an admission that an assignment had been made. An assignment may be shown by correspondence; but it must be sufficient to take the assignment out of the statute of fraud; and where in such correspondence the land covered by the lease was not described, nor the terms of the assignment stated, it was held that there was no sufficient assignment.^{7c} If the acknowledgment of the assignment has been taken by an officer not authorized to take the acknowledgment, the record of the assignment is not admissible to prove the assignment.^{7d} A person claiming an assignment of an oil and gas lease without evidence to support it cannot prevent the lessors from making a new lease to another party by inducing them, through false representation, to accept rentals under the original lease, and receipts given for rentals paid under such circumstances cannot be treated as evidence of a written contract of lease.^{7e}

permit to drill an oil well is bound to know that the permit, being a lease of land, could not be assigned without the written consent of the owner of the land, does not render the assignee a purchaser at his own peril, where the assignment contains a covenant that the assignor had a good right and lawful authority to sell the same, since he had a right to assume that the assignor had such consent. *Shannon v. Mastin* (Mo. App.), 108 S. W. 1116.

^{7a}*Heller v. Dailey*, 28 Ind. App. 555; 63 N. E. 490; *Steele v. Amer-*

ican Oil, etc., Co. (W. Va.), 92 S. E. 410.

^{7b}*Indiana Natural Gas & Oil Co. v. Duling*, 51 Ind. App. 596; 100 N. E. 96.

^{7c}*Beckett-Iseman Oil Co. v. Backer*, 165 Ky. 818; 179 S. W. 1084.

^{7d}*Midland Gas Co. v. Jefferson County Gas Co.*, 237 Pa. 602; 85 Atl. 853. (An acknowledgment taken by the prothonothry out of court.)

^{7e}*Midland Gas Co. v. Jefferson County Gas Co.*, 85 Atl. 853; 237 Pa. 602.

§ 224. Sublease.—Division.

A sale of the gas flowing from a gas well, by the lessees, to a gas company, which takes charge of the gas and conducts it off the premises, is not an assignment, but a sublease of the well itself.⁸ If a lessee has the right, by the terms of his lease, to sublet and subdivide the premises, he may release a part of them set off in partition to one of several tenants in common, and retain the lease in operation upon the remainder of such land.⁹

§ 225. Assignment carries option.

The assignment of a lease carries with it an option given in such lease to the lessee; and the assignee is entitled to exercise such option upon exactly the same terms as the lessee would have been entitled to if he had kept the lease. Thus where the lease of a farm for oil purposes gave an option to a lease on an adjoining tract on "terms that may be equal to the best terms offered by any person or persons therefor;" and the lessor falsely represented to the assignee that he had been offered twenty thousand dollars for a lease of the tract, when he had been offered only ten thousand dollars for it; and the assignee paid the larger sum in ignorance of the falsehood, it was held that he had a right to exercise the option given by the terms of the lease the same as the lessee had, and could recover back one-half the sum he had paid (with interest).¹⁰

§ 226. Transfer of lease by judicial sale.—Liability of assignee.

A lease may be transferred by a judicial or sheriff's sale of the lessee's interest in it, and the purchaser takes the latter's place, standing upon no higher plane in any respect, and, like the tenant, is liable for all taxes or improvements placed by him-

⁸ Akin v. Marshall Oil Co., 188 Pa. St. 614; 41 Atl. Rep. 748.

⁹ Blair v. Northwestern, etc., Gas

Co., 5 Ohio C. D. 620; 12 Ohio Cir. Ct. Rep. 78.

¹⁰ Guffey v. Claver, 146 Pa. St. 548; 23 Atl. Rep. 161.

self upon the leased premises.¹¹ The sale of the lease carries with it all the right of the lessee.¹² If the sale is by a receiver of a court, no title to the lease passes until the sale and assignment of the lease has been approved by the court; and until then the purchaser is not liable on the covenants and agreements contained in the lease even if he take possession. The lessor, in such an instance, has the burden to show that all steps necessary to vest the title to the lease in the assignee or purchaser were taken.¹³ The fact that the lessor makes a new agreement with the assignee will not release the lessee from his liability under the terms of the lease as they were when the assignment was made.¹⁴ The fact that the lessee may have intended to assign the lease to a company that was to be formed, will not release him from liability on the covenants of the lease, even though the lessor knew of the possibility of the assignment.¹⁵ Where the lease provided that the lessee should pay five hundred dollars for the first well drilled, and five hundred for each well thereafter drilled; and after the first well was drilled he assigned the lease, and then the assignee put down a well, it was held that the lessee was liable to pay five hundred dollars for the well the assignee put down.¹⁶

¹¹ *In re Huddell*, 16 Fed. Rep. 373; *Lykens Valley Co. v. Dock*, 62 Pa. St. 232; *Aderhold v. Oil Well Supply Co.*, 158 Pa. St. 401; 28 Atl. Rep. 22; *Jashanosky v. Volrath*, 59 Ohio St. 540; 53 N. E. Rep. 46; 69 Am. St. Rep. 786; *Simons v. Van Ingen*, 86 Pa. St. 330; *Acklin v. Waltermier*, 10 Ohio C. C. Dec. 629; 19 Ohio C. C. Rep. 372.

¹² *Murphy v. Hardee*, 12 Ohio Cir. Ct. Dec. 837.

¹³ *Heller v. Dailey*, 28 Ind. App. 555; 63 N. E. Rep. 490.

But subsequently, by the same court, it was held that the report of the sale by the receiver and its

approval by the court was sufficient to assign the lease—without a formal assignment—to render the assignee liable under the terms of the lease. *Robyn v. Pickard*, 37 Ind. App. 161; 76 N. E. Rep. 642, citing *Mayhew v. West Virginia Oil Co.*, 24 Fed. 205, 215; and *Blend v. Bowie*, 53 Ala. 152, 159.

¹⁴ *Fisher v. Milliken*, 8 Pa. St. 111.

¹⁵ *Sanders v. Sharp*, 153 Pa. St. 555; 31 W. N. C. 374; 25 Atl. Rep. 524.

¹⁶ *Pittsburgh, etc., Co. v. Greenle*, 164 Pa. St. 549; 30 Atl. Rep. 489.

§ 227. Equitable assignee in possession.

An equitable assignee, though he takes possession under the lease, is not a legal assignee, nor is he liable on the covenants of the lease to the lessor. Thus where a lease was not assignable without the consent of the lessor, but the lessee agreed in writing to assign the lease to certain persons, who took possession of the premises and worked the mines upon them, but no deed of assignment was ever executed to them; and these persons afterward assigned over all their interests to an indigent workman, the court declared the assignment to be a good equitable one under the agreement, but the persons with whom the agreement was made were not liable at the suit of the lessor for the performance of the covenants, for the agreements in the lease were not between the lessor and such persons, and a court of equity could not treat the agreement as a tenancy.¹⁷ But where the lease was to a trustee for five other persons, who entered and worked the mines; and the trustee becoming insolvent, the lessor sued these five persons for the rent, it was decreed that an account should be taken of the amount due the lessor, by the trustee, and if he made default, then an account should be taken of the moneys of these five persons in his hands, and the amount due the lessor paid thereout; and in case such moneys should not be sufficient to pay the lessor, then such five persons were to each pay one-fifth part of the deficiency; and they should continue to pay so long as the rents became due.¹⁸

§ 228. Lease unassignable.

If a lease be unassignable — as, for instance, if it have no words in it making it run to the assigns of the lessee, or if there is an express statement in it that it is not or can not be assigned — that will not permit one who takes possession under it by virtue of an attempted assignment to escape liability to the lessor. In such an instance the occupant of the ground is

¹⁷ Cox v. Bishop, 8 De G. M. and G. 815; 26 L. J. Ch. 389; 3 Jur. (N. S.) 499; 29 L. T. 44; 5 W. R. 437.

¹⁸ Lee v. Roundwood Colliery Co. [1897], 1 Ch. 373; 66 L. J. Ch. 186; 75 L. T. 641; 45 W. R. 324.

liable to the owner upon an implied assumpsit to pay a reasonable compensation for his occupation, or for trespass for the wrongful occupation.¹⁹ And the lessor may obtain a right against the assignee where he and the latter have entered into an agreement with respect to the occupancy of the premises by reason of such assignee having taken possession under the attempted assignment. Such was the case where an agreement was entered into between the lessor and assignee for an extension of the time of performance of the covenants of the lease, for the payment of increased royalties, and also into a provision that the lease "shall remain in full force in all particulars in which the same is not hereby modified." This gave the assignee all the rights of the original lessee, even to a renewal of the lease.²⁰

§ 229. Assignment of royalties by lessor.—Administrator.

A lessor may assign a lease he has given, either by proper words of assignment on the lease, if he can obtain possession of it, or by a separate instrument; and his assignment will carry the rent or royalties thereafter falling due, but not those that have fallen due before the date of the assignment, unless the

¹⁹ *Walters v. Northern Coal Mining Co.*, 25 L. J. Ch. (N. S.) 633; 5 De G. M. and G. 629; 26 L. T. 167; 4 W. R. 140; 2 Jur. (N. S.) 1. But see *Oil Creek, etc., v. Stanton Oil Co.*, 23 Pa. Co. Ct. Rep. 153; 30 Pittsb. L. J. (N. S.) 286.

²⁰ *Guffey v. Clever*, 146 Pa. St. 548; 23 Atl. Rep. 161.

A lease contained a clause that it should terminate on "a sale or transfer" of the property during the term, it was held that the word "transfer" related to a transfer of the title, and not a mere transfer of the right of possession. *Ober v. Schenck*, 23 Utah 614; 65 Pac. Rep. 1073.

A deed conferring upon skilled miners the privilege to raise ore, with the use of timbers and water

on the tract, to have and to hold the land as long as they should deem it worthy of searching for minerals, in which they agree to not use the land for any other purposes, is an unassignable lease; because the personal skill of the miners has been contracted for. *Hodgson v. Perkins*, 84 Va. 706; 5 S. E. Rep. 710.

An oil well on a lease to continue as long as oil could be procured from the premises in paying quantities, was abandoned by the lessees, because of the failure of the output. It was held that the assignment of the lease thereafter gave no title to the assignee, even though the lessees had first attempted to renew it. *Cole v. Taylor*, 8 Super. Ct. (Pa.) 19.

right to them is also assigned. In order to assign the lease it is not necessary to make a sale or transfer of his reversionary interest in the land. A lease was assigned after it had expired, by the use of the following language endorsed upon it: "For value received we hereby sell, transfer and assign all our interests, right and title in and to the original contract to," a person being named as assignee. It was claimed that this did not pass the right to collect damages then due by the terms of the lease, but the court held otherwise. "They had a right of action under the contract," said the court, "and when they assigned all their rights and interest therein, they assigned this right of action. The time for which the land was leased having expired, there remained nothing but this right of action to be transferred. To hold that the assignment transferred only the original instrument would be too narrow a construction."²¹ So where the owner of land executes a gas or oil lease upon it, and afterward conveys the land by an ordinary quit claim or warranty deed the grantee is entitled to the rents maturing after the conveyance.²² But where a lease for years reserves a certain royalty for all oil or gas produced, the royalty reserved goes to the personal representatives of the deceased lessor, and not to his heirs.²³ So where the royalty reserved was a certain fraction of the oil produced; and afterward the lessor gave the land to his children, reserving to himself a life estate in it, it

²¹ Indianapolis, etc., Gas Co. v. Pierce, 25 Ind. App. 116; 56 N. E. Rep. 137. See Morgan v. Yard, 13 Pittsb. L. J. (N. S.) 178; 12 W. N. C. 449; Chandler v. Pittsburgh, etc., Co., 20 Ind. App. 165; 50 N. E. Rep. 400.

²² Chandler v. Pittsburgh, etc., Co., 20 Ind. App. 165; 50 N. E. Rep. 400. In Swint v. McCalmont Oil Co., 184 Pa. St. 202, 38 Atl. Rep. 1021, it was assumed that the rents passed to the grantee. Undue rents for coal pass. Hendrix v. McBeth, 61 Ind. 473; 28 Amer. Rep. 680; Hendrix v. Hendrix, 65 Ind. 329; McDowell v. Hendrix, 67 Ind. 513;

Woodburn's Estate, 138 Pa. St. 606; 21 Atl. Rep. 16; 21 Am. St. Rep. 932 (oil and gas); Manderbach v. Bethany, etc., Home, 109 Pa. St. 231; 2 Atl. Rep. 422 (rent for water from a spring). See Butt v. Ellett, 19 Wall. 544; Van Rensselaer v. Hays, 19 N. Y. 68; 75 Am. Dec. 278; Peerrin v. Lepper, 34 Mien. 292; McGuffie v. Carter, 42 Mich. 497; 4 N. W. Rep. 211; Page v. Culver, 55 Mo. App. 606; West Shore Mills Co. v. Edwards, 24 Ore. 475; 33 Pac. Rep. 987; Morrow v. Sawyer, 82 Ga. 226; 8 S. E. Rep. 51.

²³ Brunot's Estate, 29 Pittsb. L. J. (N. S.) 105.

was held that he was entitled to the royalty, under the rule that the life-tenant is entitled to work all wells open at the time the tenancy is created.²⁴ Where a testator owned six hundred acres of land, divided into three adjoining farms, upon all of which was an oil lease, in which a certain royalty was reserved and which had twelve years to run at his death; and wells, when he died, were in operation on one farm only, which was given by his will to one of his three children, and the other two farms to his other two children severally, the court decided that the royalties should also be divided, and one-third given to each devisee; for the reason that the working of the oil wells on the one farm had the effect to drain the oil from the other two farms, and thus the devisee of those two farms would receive no benefit from the lease which covered their farms.²⁵ If the owner of the reversion has sold the premises, he cannot maintain an action in his own name for the use of his vendee, for a breach of a covenant that has occurred after he has made the sale.²⁶

²⁴ *Koen v. Bartlett*, 41 W. Va. 559; 23 S. E. Rep. 664; 31 L. R. A. 128.

Where the owner of land conveyed it, reserving for life one-eighth of the oil produced, and the grantee leased the land, reserving to himself one-eighth, it was held that the last reservation was one-eighth of seven-eighths, for it could not be contended that when he made his reservation he intended to reserve any part of the oil reserved by the original grantor, but he reserved a share only of that which he was entitled to under his grant. *Harris v. Cobb*, 49 W. Va. 350; 38 S. E. Rep. 559; overruled in *Paxton v. Benedum-Trees Oil Co.* (W. Va.), 92 S. E. 472.

²⁵ *Wettengel v. Gormley*, 160 Pa. St. 559; 28 Atl. Rep. 934; 40 Am. St. Rep. 733; *Wettengel v. Gormley*, 184 Pa. St. 364; 39 Atl. Rep. 1118. But see where the Ohio Supreme Court refused to follow these cases. *Northwestern Ohio Nat. Gas Co. v. Ullery*, 67 N. E. Rep. 494.

²⁶ *Stoddard v. Emery*, 128 Pa. St. 436; 18 Atl. Rep. 339.

The owner of oil land conveyed an undivided interest in it, and gave to the grantees the right to drill for oil on the portion unconveyed, reserving a royalty to himself. Afterward he sold the remaining undivided interest, subject to the oil lease, of which he finally became the assignee. By will he left all his property to his devisees, and they conveyed to third parties, reciting in the deed that it was their intention to convey all lands and premises owned by them, and in which they had an interest. It was held that the conveyance passed no rights under the oil lease, for it was a mere incorporeal right, which the conveyance did not embrace. *Wagner v. Mallory*, 41 N. Y. App. Div. 126; 58 N. Y. Supp. 526; affirmed 169 N. Y. 501; 62 N. E. Rep. 584. But did not the holders of the lease have an interest in the

If there has been a joint reservation of royalties, an assignment of his interest in the lease by one of those jointly interested does not amount to a severance of the royalties nor apportionment of them among the co-lessors, but the assignee becomes a tenant in common of the royalties with the co-lessors, and any one of them can receipt for the same.²⁷ A grant of the royalties, rents and income arising from the production of the oil from the land is a grant of the oil in such land.^{27a}

§ 230. Assignee of lessee bound by agreements in lease.—Privity of estate.—Liability of assignee for rents.(a)

The assignee of a lessee of a lease takes the position of his assignor and becomes bound by all the terms, agreements and covenants of the lease to the lessor, to be performed while he holds the lease, the same as if he had been the original lessee. "The original lessee is bound by the contract," to quote from an opinion of the Court of Indiana, "to make the payments. The assignees are bound by their acceptance of the lease, to make good the covenants to pay rent, therein contained. Their liability is upon the covenants, and arises, not from any express assumption or agreement to pay it, which might be contained in the written assignment, but from the privity of estate by reason of their ownership and right to enjoy the benefit of the lease. Covenants to pay rent and royalties run with the land."²⁸ "The assignee is answerable for the rent," said the Supreme Court of California, "during his ownership of the terms under the assignment, and his liability therefor arises out of the privity of estate, and this, without reference to any obligation assumed by him in the contract of assignment."²⁹ The Supreme Court

land? See *Heller v. Dailey*, 28 Ind. App. 555; 63 N. E. Rep. 490.

²⁷ *Swint v. McCalmont Oil Co.*, 184 Pa. St. 202; 41 W. N. C. 491; 38 Atl. Rep. 1021.

^{27a} *Paxton v. Benedum-Trees Oil Co.* (W. Va.), 92 S. E. 472. The case of *Harris v. Cobb*, 49 W. Va. 350; 38 S. E. 559, cited in this section in note 24 is overruled in *Paxton v. Benedum-Trees Oil Co.* (W. Va.), 92 S. E. 472. See also *Headley v. Hoopengartner*, 60 W. Va. 626; 5 S. E. 744.

(a) § 862.

²⁸ *Edmonds v. Mounsey*, 15 Ind. App. 399; 44 N. E. Rep. 196, citing *Watson Coal, etc., Co. v. Casteel*, 73 Ind. 296; *McDowell v. Hendrix*,

67 Ind. 513; *Gordon v. George*, 12 Ind. 408; *Stewart v. Long Island Ry. Co.*, 102 N. Y. 601; *Moule v. Garrett*, L. R. 5 Exch. 132; 39 L. J. Exch. 69; 22 L. T. 343; 18 W. R. 697. See also *Fennell v. Guffey*, 139 Pa. 341; 20 Atl. 1048; *Bradford Oil Co. v. Blair*, 113 Pa. 83; 4 Atl. 218.

²⁹ *Bonetti v. Treat*, 91 Cal. 223; 27 Pac. Rep. 612; *Breckinridge v. Parrott*, 15 Ind. App. 411; 44 N. E. Rep. 66; *Goddard's Appeal*, 1 Walker (Pa.) 97; *Bradford Oil Co. v. Blair*, 113 Pa. St. 83; 4 Atl. Rep. 218; *Washington, etc., Gas Co. v. Johnson*, 123 Pa. St. 576; 16 Atl. Rep. 799; 11 Morr. Min. Rep. 165; *Goss v. Fire Brick Co.*, 4 Super Ct.

of Pennsylvania has stated the rule in a single sentence, thus: "It is settled law that covenants to pay rent or royalty run with the land, and that the assignee of the lease is liable for the payment of all rents or royalties which accrue while he held the assignment of the lease."³⁰ Of course, when the lessor seeks to hold the assignee liable on the covenants and agreements in the lease, he has the burden to show that an actual assignment was made.³¹ If the lease has expired before the assignment, then the assignee is not liable under its terms, because the assignor having no interest in the lease or in the premises, he owns nothing under such lease capable of an assignment.^{31a} If the lease contains a covenant that the lease should be binding on any assignee of it, then an assignee so long as he retains the lease, is liable for the rents due under it.^{31b} A municipality leasing gas wells cannot escape the payment of rent by execution of a release of the agreement, on the ground that the rights it obtained will be of no value.^{31c} But where the gas contract amounts to a defeasible conveyance of interest

(Pa.) 167; *Fennell v. Guffey*, 139 Pa. St. 341; 20 Atl. Rep. 1048; *Williams v. Short*, 155 Pa. St. 480; 26 Atl. Rep. 662; *Comegys v. Russell*, 175 Pa. St. 166; 34 Atl. Rep. 657; *Fennell v. Guffey*, 155 Pa. St. 38; 25 Atl. Rep. 785; *Springer v. Citizens', etc., Gas Co.*, 145 Pa. St. 430; 22 Atl. Rep. 986; *Aderhold v. Oil Well Supply Co.*, 158 Pa. St. 401; 28 Atl. Rep. 22; *Walters v. Northern, etc., Co.*, 25 L. J. Ch. (N. S.) 633; 5 De G. M. and G. 629; 26 L. T. 167; 4 W. R. 140; 2 Jur. (N. S.) 1; *Indianapolis Gas Co. v. Pierce*, 36 Ind. App. 573; 76 N. E. Rep. 173; *Indianapolis Gas Co. v. Rayle*, 36 Ind. App. 706; 76 N. E. Rep. 176; *MacDonald v. O'Neil*, 21 Pa. Super. Ct. Rep. 364; *Robyn v. Pickard*, 37 Ind. App. 161; 76 N. E. Rep. 642.

³⁰ *Fennell v. Guffey*, 139 Pa. St. 341; 20 Atl. Rep. 1048; *Heller v. Dailey*, 28 Ind. App. 555; 63 N. E. Rep. 490; *Montgomery v. Kiekok*, 188 Ill. App. 348; *Ardizzone v. Archer (Okl.)*, 160 Pac. 446; *Pierce Fordyce Oil Ass'n v. Woodrum (Tex. Civ. App.)*, 188 S. W. 245; *Indiana Natural Gas & Oil Co. v. Duling*, 51 Ind. App. 596; 100 N. E. 96.

³¹ *Heller v. Dailey*, 28 Ind. App. 555; 63 N. E. Rep. 490.

^{31a} *Chaney v. Ohio-Indiana Oil Co.*, 32 Ind. App. 193; 69 N. E. Rep. 477.

^{31b} *Ardizzone v. Archer (Okl.)*, 160 Pac. 446.

^{31c} *Butler v. Iola (Kans.)*, 163 Pac. 652.

in fee, an assignee who does not specially assume the burdens therein provided for is not bound to perform them.^{31d}

§ 231. Ground of assignee's liability to lessor.

By the assignment of the lease a privity of estate is not created between the assignor and the lessor for that period prior to the assignment, nor for the part of the lease remaining after he has ceased to enjoy it. "The assignee, having entered under an assignment and thus come into privity, that privity continues as long as his beneficial enjoyment of the demised property or right to it remains."³² The liability of the assignee to the lessor is, therefore, based upon their privity of estate, and not necessarily upon an agreement to keep the covenants of the lease. "A lessee," said Judge Simonton, "remains liable on his express obligation, notwithstanding he may have assigned his lease. And the lessor may sue at his election either the lessee or the assignee, or may pursue this remedy against both at the same time, though, of course, with but one satisfaction. In such cases, the liability of the original lessee depends

^{31d} *Pierce Fordyce Oil Ass'n v. Woodrum* (Tex. Civ. App.), 188 S. W. 245.

Where an instrument relating to oil and gas rights amounts to a conveyance of an interest in the fee subject to defeasance by condition subsequent, an assignee who did not specially agree to assume the burdens therein contained would not be bound; but, where the instrument is a mere lease contract, the assignee who accepts the assignment of the rights and privileges under the lease would be burdened with the obligations and covenants running with the land. *Pierce Fordyce Oil Ass'n v. Woodrum* (Tex. Civ. App.), 188 S. W. Rep. 245.

An assignee of an oil and gas lease, while not liable for the consequences of his assignor's failure to drill a well, is liable for the consequences of his own breach of agreement, where, after acquiring title, he continued to pay delay rentals in lieu of drilling the well. *Hefner v. Light, Fuel & Power Co.* (W. Va.), 87 S. E. 206.

If litigation be pending concerning the lease, the lessee is bound to take notice of it, and will be bound by the result thereof. *Pittinger v. Ramage*, 40 Ind. App. 486; 82 N. E. Rep. 478.

³² *Negley v. Morgan*, 46 Pa. St. 281.

upon privity of contract and continues during the whole term, while the liability of the assignee depends upon privity of estate, created by the assignment and continues only during the time he holds legal title to the leasehold estate during the assignment.”³³ “For, although there was no privity of contract between the lessor and the assignee of the lessees, yet there was a privity of estate between them, as long as the assignee remained in possession of the demised premises, which created the debt for the rent or royalty reserved in the lease, in favor of the lessor and against the assignee.”³⁴ “Turning then to the question raised by the points,” said the Supreme Court of Pennsylvania, “we find the facts to be assumed therein, and the liability of the gas company to depend upon the extent to which the covenants of Guffey run with the land. That they continued liable, notwithstanding their assignment to Robbins, is very clear. The covenant was their own, and their privity of contract with their lessors continued notwithstanding their assignment of the lease. Their assignee, Robbins, who was in possession when the time for performance arrived, was also liable, because of the privity of estate which arose upon his acceptance of the assignment. Acquiring the leasehold estate by the assignment of the lease, he is fixed with notice of its covenants, and he takes the estate of his assignor *cum onere*. But as his liability grows out of privity of estate, it ceases when the privity ceases. If he had assigned before the time for performance, his liability would have ceased with his title, and liability would have attached to his assignee by reason of privity; but he would not be liable for those previously broken, or subsequently maturing, because of the absence of any contract

³³ *McBee v. Sampson*, 66 Fed. Rep. 416; *Childs v. Clark*, 3 Barb. Ch. 52; 49 Am. Dec. 164; *Johnson v. Sherman*, 15 Cal. 287; 76 Am. Dec. 481; *Wall v. Hinds*, 4 Gray 256; *Smith v. Harrison*, 42 Ohio St. 180.

³⁴ *Watson, etc., Co. v. Casteel*, 73 Ind. 296, citing *Howland v. Coffin*, 9 Pick. 52; *Gordon v. George*, 12 Ind. 408; *Carley v. Lewis*, 24 Ind. 23; *McDowell v. Hendrix*, 67 Ind. 513.

relation with the lessor. While he holds the estate and enjoys its benefits, he bears its burdens by assignment, even though, as is said is done in the case, his assignment be to a beggar.”³⁵ And the court referred to the claim that a certain case³⁶ held a different rule, and declared it was clearly distinguishable from the case then in hand. “The covenant which it was sought to enforce in that case was not for the completion of successive wells at successive dates, but it was for the commencement of the work of developing Blair’s farm at a time certain, and to ‘continue with due diligence and without delay to prosecute the business to success or abandonment, and, if successful, to prosecute the same without interruption.’ Two wells were completed, and were successful oil wells. The assignee of the lease owned adjoining lands upon which it was operating, and it stopped work on the Blair farm. The action rested on the breach of the covenant to prosecute the business of producing oil from the land of the lessor with due diligence and ‘without interruption.’ The obligation of a covenant to prosecute the business developing the land of the lessor without delay and without interruption, is a continuing one. The breach for which the Bradford Oil Co. was held liable was not that of some previous holder of the title, but its owner.”³⁷

³⁵ Washington, etc., Gas Co. v. Johnson, 123 Pa. St. 576; 16 Atl. Rep. 799; Dailey v. Heller, 41 Ind. App. 379; 81 N. E. 219; Fisher v. Guffey, 193 Pa. 393; 44 Atl. 452; Jackson v. O’Hara, 183 Pa. 233; 38 Atl. 624; Burton v. Forest Oil Co., 204 Pa. 249; 54 Atl. 266; Indiana Nat. Gas Co. v. Hinton, 159 Ind. 398; 64 N. E. 224; Moore v. Sawyer, 167 Fed. 826; Woodlawn Oil Co., v. Crawford, 55 Ohio St. 161; 44 N. E. 1093; 34 L. R. A. 62; 36 Ohio L. Bull. 231; Heller v. Dailey, 28 Ind. App. 555; 63 N. E. 490; Bradford Oil Co. v. Blair, 113 Pa. 83; 4 Atl. 218; Fennell v. Guffey, 139 Pa. 341; 20 Atl. 1048.

³⁶ Bradford Oil Co. v. Blair, 113 Pa. St. 83; 4 Atl. Rep. 218.

³⁷ Akin v. Marshall Oil Co., 188 Pa. St. 614; 41 Atl. Rep. 748; Aderhold v. Oil Well Supply Co., 158 Pa. St. 401; 28 Atl. Rep. 22; Drake v. Lacoe, 157 Pa. St. 17; 27 Atl. Rep. 538; Borland’s Appeal, 66 Pa. St. 470; Goss v. Brick Co., 4 Super. Ct. (Pa.) 167.

See the excellent statement of the liability in Heller v. Dailey, 28 Ind. App. 555; 63 N. E. Rep. 490; Edmonds v. Mounsey, 15 Ind. App. 309; 44 N. E. Rep. 196; Bonetti v. Treat, 91 Cal. 223; 27 Pac. Rep. 612; 14 L. R. A. 151.

If the lease has expired before it is assigned, nothing passes under it, there is no priority of estate and no liability of the assignee under

§ 232. Assignee's liability broadened by terms of assignment or by outside contract.

The liability of an assignee may be broadened by the terms of the assignment, or by a contract outside of it. If there be express covenants in the assignment, they are so many additions to the covenants of the lease, and the lessor may take advantage of them if they run in his favor.³⁸ Thus if the assignment provides that the assignee shall hold the lease under the terms of the lease and subject to the rents and covenants therein on the part of the lessee, and he accepts it, he will be liable for rentals which had matured and remained unpaid at the time it was executed.³⁹ An agreement to perform the covenants of the lease renders the assignee liable for the unperformed covenants; and also renders him liable for the rent or royalties accruing after he may have also assigned the lease to another.⁴⁰ So a condition in an assignment that if the interest conveyed by the assignment should be assailed for any debts of the assignee, the rights so assigned should be forfeited to the assignors is valid.^{40a}

§ 233. Extent of assignee's liability.(a)

While the assignee is liable for the carrying out of the terms of the lease, yet he is liable only for those obligations that accrue while he enjoys its privileges, or, as it has been said, during the continuance of his own estate. His agreement is that during his estate he will pay the rents or royalties due under and perform the covenants of the lease.⁴¹ He is not liable,

its terms. *Chaney v. Ohio & Indiana Oil Co.*, 32 Ind. App. 193; 69 N. E. Rep. 477.

If the covenants of the lease run with the land, in an action against the assignee for a failure to carry them out during his holding under the lease, it is not necessary to aver that he agreed to perform them. *Indiana Nat. Gas Co. v. Hinton*, 159 Ind. 398; 64 N. E. 224.

³⁸ *Consolidated Coal Co. v. Peers*, 39 Ill. App. 453; same case, 150 Ill.

344; 37 N. E. Rep. 937; *Goddard's Appeal*, 1 Walk. (Pa.) 97.

³⁹ *Woodland Oil Co. v. Crawford*, 55 Ohio St. 161; 36 Ohio L. Bull. 231; 44 N. E. Rep. 1093; 34 L. R. A. 62.

⁴⁰ *Port v. Jackson*, 17 Johns. 239; *Martineau v. Steele*, 14 Wis. 272.

^{40a} *Julian v. Eagle Oil & Gas Co.*, 83 Kan. 127; 109 Pac. Rep. 996.

⁴¹ *Wolveridge v. Steward*, 1 C. and M. 644; 2 L. J. Exch. 303; 3 Tyr. 637; *Moule v. Garrett*, L. R.

(a) Forfeiture, §§ 866, 900.

without an express agreement in the assignment, to pay for rents or royalties that had accrued, or for the performance of covenants that were so performed in point of time before the assignment. Thus, where the assigned lease provided that a well should be completed within a certain time, and if not a specified sum of money per year should be paid for each year during which the completion of a well was delayed, it was held that the assignee was not liable for the payment of such sum, where he assigned the lease before the lapse of the year; for the amount due did not and could not accrue before he assigned the lease, and consequently he was not liable.⁴² Nor is the assignee liable for damages for failure to dig a well upon the demised premises when the time for the completion of the well expired before the lease was assigned.⁴³ If the time for the completion of the well had expired after the assignment, the assignee would have been liable.⁴⁴ In a coal lease it was provided that royalties should be paid semi-annually, and if the amount due at the end of any half year remained due at the end of a year thereafter, the lease by reason of such delinquency was forfeited, and the lessor was authorized "to enter and take possession without recourse to law." Four years after its execution the lessee gave E and others an option to purchase the lease, one of the conditions being that they should test the character of the oil veins on the land by boring down through them. After the boring was done, and nearly a year after the option was given, E notified the lessee that they accepted his option. More than a year after this notice was given, E and his associates called upon the lessor to pay any royalties then

5 Exch. 132; 39 L. J. Exch. 69; 22 L. T. 343; 18 W. R. 697; Washington, etc., Gas Co. v. Johnson, 123 Pa. St. 576; 16 Atl. Rep. 799; 11 Morr. Min. Rep. 165; Walters v. Northern Coal Mining Co., 25 L. J. (N. S.) Ch. 633; 5 De G. M. and G. 629; 26 L. T. 167; 4 W. R. 140; 2 Jur. (N. S.) 1; Heller v. Dailey, 28 Ind. App. 555; 63 N. E. Rep. 490; Fennell v. Guffey, 139 Pa. 341; 20 Atl. 1048; Breckenridge v. Par-

rott, 15 Ind. App. 417; 44 N. E. 66.

⁴² Watt v. Equitable Gas Co., 8 Super. Ct. (Pa.) 618; 29 Pittsb. L. J. (N. S.) 221; 43 W. N. C. 215; Chaney v. Ohio Oil Co., 32 Ind. App. 193; 69 N. E. 477; Columbus Gas & Fuel Co. v. Knox, etc., Co., 91 Ohio St. 35; 109 N. E. 529.

⁴³ Washington, etc., Gas Co. v. Johnson, *supra*. § 900, note 43.

⁴⁴ Aderhold v. Oil Well Supply Co., 158 Pa. St. 401; 28 Atl. Rep. 22.

due, and were told by him that none were due, but if there were, he would not take them from them — from E and his associates. Two months afterwards the lessor re-entered for the non-payment of the royalties within a year after they had accrued. It was shown that the lessor knew that E and his associates had been boring upon the land, and that he had pointed out to them the boundary lines of the tract. It was held that E and his associates were bound to take notice of the covenants of the lease; that the fact the lessor knew of the negotiations for the assignment of the lease gave E and his associates no rights as against the lessor, except such as the lessee had, and imposed no duties on the lessor toward them, except such as he was bound to the lessee under the terms of the lease; that E and those with him were bound to take notice whether the royalties had been and were being paid, what was the state of the accounts, the responsibility for which they were about to assume; that as they had neither paid nor offered to pay the royalties they had no higher standing than the lessee so far as their contract rights were concerned; and that the lessor was not estopped as against them by the fact that he knew the boring was going on, or by what he had said to them.⁴⁵ A lessee assigned an oil lease, in consideration of which it was agreed that if the assignee or his assignees should “operate under the said leaseholds, that on each of the leases he so operates, and if the oil is found in paying quantities, the said assignee or his assignees agree to pay the lessee” one hundred dollars for the leasehold upon which a paying well was found. The assignee surrendered the leases to the lessors and took new ones containing the same provisions, which he assigned to innocent parties. It was held that the lessee’s claim for payment could be enforced only when oil had been found on the land in paying quantities; and in that case, by whomsoever found, a recovery could be had against the assignee; but the fact of the surrender gave no cause of action.⁴⁶ When the lessor sues the assignee on the covenants of the lease, he has the burden to

⁴⁵ *Comegys v. Russell*, 175 Pa. 253; 21 Atl. Rep. 735. See *Breckenridge v. Parrott*, 15 Ind. App. St. 166; 34 Atl. Rep. 657.

⁴⁶ *Smith v. Munhall*, 139 Pa. St. 411; 44 N. E. Rep. 66.

show an actual assignment. And where the receiver of a lessee assigned the lease, but the assignment or transfer was never approved by the court, it was held that the assignee was not liable on the covenants contained in the lease;⁴⁷ but if the court approve the sale made by the receiver, and the purchaser of the lease enter on the premises, he is liable under the lease, though no formal assignment of the lease has been made, for the reason that the court is not required to make a formal assignment, the approval of the report taking its place.^{47a}

§ 234. Liability of assignee of a part interest in lease.

Where the lessee assigns only a part of the lease, as an undivided fourth part, and he and the assignee operate the lease together as partners, the liability of the assignee may be broader than it otherwise would have been.⁴⁸ Thus, a written assignment of an undivided one-half of a lessee's interest in an oil and gas lease, together with his entire gas right therein, was held to make the assignee a joint owner of the lease, and jointly liable thereunder with the original lessee.⁴⁹ The court was also of the opinion that the assignee of a one-half or other distinct interest in the lease was jointly liable for the performance of a covenant therein to sink an oil well or pay a monthly rental. The assignee of an undivided interest of a partner in the usual oil or gas lease takes it subject to the partnership debts.⁵⁰

§ 235. Liability of occupier under unassigned lease.

If the lessee merely permit one to occupy the leased premises, such occupier is not liable to the lessor for the rent, nor for use and occupation of the premises; but if the occupier has an agreement for an assignment of the lease, and he call upon the lessee to make his agreement good, then the lessor may look to the occupier for the rents and performance of the

⁴⁷ *Heller v. Dailey*, 28 Ind. App. 555; 63 N. E. Rep. 490.

^{47a} *Robyn v. Peckard*, 37 Ind. App. 161; 76 N. E. Rep. 642.

⁴⁸ *Boydston v. Meacham*, 28 Mo. App. 494.

⁴⁹ *Jackson v. O'Hara*, 183 Pa. St. 233; 38 Atl. Rep. 624; *Burton v. Forest Oil Co.*, 204 Pa. 349; 54 Atl. 266.

⁵⁰ *Chamberlain v. Dow*, 16 W. N. C. 532.

An assignment of one-eighth interest in an oil lease held to require the assignee to pay only one-eighth of the expense, though his assignor paid a proportion of the expense double his interest. *Cox v. Butts* (Okla.), 149 Pac. 1090.

covenants falling due during the time he is in possession of the premises.⁵¹ So, where a landowner sued to recover rental for a natural gas well, and the contract of lease was not between him and the defendant, who was operating a well under the lease from another person, it was held that a nonsuit in an action of assumpsit was properly entered.^{51a}

§ 236. Assignee not taking possession liable.

The assignee of an oil lease cannot escape liability on the ground that he never took actual possession, nor commenced operations on the leased premises, the lessor not being at fault. This is true according to the greater number of authorities.⁵² This is particularly true of the ordinary oil or gas lease. In speaking of an instance where possession had not been taken under an oil lease assigned, the court used the following language: "Whatever may be the rule as to an ordinary lease, where, until the well is completed, there can be no further physical enjoyment, as to rights created by leases, such as this, where, until the well is completed, there can be no further enjoyment than the possession of the right, which may be exercised at will, the authorities bearing directly upon the proposition involved, authorizes us to declare that the obligations of the assignees are not postponed until the actual entry upon the land."⁵³

⁵¹ *Walters v. Northern Coal Mining Co.*, 25 L. J. Ch. (N. S.) 633; 5 De G. M. and G. 629; 26 L. T. 167; 4 W. R. 140; 2 Jur. (N. S.) 1.

^{51a} *Titley v. Craig*, 222 Pa. 618; 72 Atl. Rep. 233.

Obligees who permit lessees to assign their contract to a third person without the consent of guarantors of the lease, and who looked to such third person for its performance, cannot recover on the guaranty. *Williamson v. Davey*, 52 Tex. Civ. App. 353; 114 S. W. 195.

⁵² *Edmonds v. Mounsey*, 15 Ind. App. 399; 44 N. E. Rep. 196; *Wal-*

ton v. Cronly, 14 Wend. 63; *Williams v. Bosanquet*, 1 Brod. and Birg. 238; *Burton v. Barelay*, 7 Bing. 745; *Cook v. Harris*, 1 Ld. Raym. 367; *Babcock v. Scoville*, 56 Ill. 461; *Board v. Boatman's Ins. Co.*, 5 Mo. App. 91; *Smith v. Brinker*, 17 Mo. 148; *Willi v. Dryden*, 52 Mo. 319; *University of Vermont v. Joslyn*, 21 Vt. 52; *Damainville v. Mann*, 32 N. Y. 197; *Carter v. Hammett*, 18 Barb. 608; *Fennell v. Guffey*, 155 Pa. St. 38; 26 Atl. Rep. 785; *Heller v. Dailey*, 28 Ind. App. 555; 63 N. E. Rep. 490.

⁵³ *Edmonds v. Mounsey*, *supra*.

§ 237. Several successive assignees.

If there be several successive assignees, each will be liable for the performance of the covenants or agreements contained in the lease which matured or required performance while he was in possession or enjoying the estate, or, in other words, so long as he holds the lease.⁵⁴

§ 238. Lease not executed by lessee, but possession taken under the lease, effect.

"It can make no difference in principle that the lease is not executed by the person to whom the demise is made — except that (in such a case) the landlord may not be able to maintain an action of covenant; but if the person to whom the demise is made accepts the lease, either by occupying the demised property himself or by permitting others (as his nominees or as his *cestuis que trustent*) to do so, the non-execution of the instrument of demise will not prevent the lessor from recovering the rent by distress or by action of debt against the lessee. Of course, where the demise is made to a person who neither executes the lease nor adopts it by entry or otherwise, he (the lessee) is a mere stranger against whom the landlord can have no rights; and if (in such last-mentioned case) other persons enter claiming to be the nominees or the *cestuis que trustent* of such non-executing and non-adopting lessee, the landlord's remedy must be by distress or (*semble*, by action of trespass), and is not either in debt or on covenant."⁵⁵

⁵⁴ Bradford Oil Co. v. Blair, 113 Pa. St. 83; 4 Atl. Rep. 218; Washington, etc., Gas Co. v. Johnson, 123 Pa. St. 576; 16 Atl. Rep. 799; 11 Morr. Min. Rep. 152; Heller v. Dailey, 28 Ind. App. 555; 63 N. E. Rep. 490; Fennell v. Guffey, 139 Pa. 341; 20 Atl. 1048; Dailey v. Heller, 41 Ind. App. 379; 81 N. E.

219; Fisher v. Guffey, 193 Pa. 393; 44 Atl. 452; Jackson v. O'Hara, 183 Pa. 233; 38 Atl. 624; Burton v. Forest Oil Co., 204 Pa. 249; 54 Atl. 266; Moore v. Sawyer, 167 Fed. 826.

⁵⁵ Bainbridge on Mines (5th ed.), p. 294.

§ 239. Lessee released by substitution of assignee.

But a lessee may be released by the act of the lessor in accepting and substituting the assignee in place of the lessee. Thus in an Indiana case it was said by the court: "There has been a diversity of decision both as to the facts which may constitute a surrender by operation of law and as to the legal principles applicable thereto. We will not undertake to discuss the general subject, but will confine our observations to the instance of a substitution of tenants and to the case where there has been an assignment by the lessee to a third person. If the law will imply a surrender in a given case, it would seem to be reasonably clear that the implication will arise from the acts of the parties, and will not be based upon proof of an oral agreement between lessor and lessee. The one, whether lessor or lessee, against whom such a surrender is asserted by the other, must have been a party to some action from which a surrender may properly be presumed by the court. The surrender should be indicated by acts. We will not pause to seek to reconcile the various opinions as to the principle of law on which this conclusion of the court should proceed. If the lessee assigns to a third person, and the lessor accepts rents from the assignee in peaceable possession, it may be presumed, from this act of the lessor in accepting the rent due from the lessee through hands of another in possession, that the lessor acquiesces in the assignment; but such conduct does not necessarily indicate that the lessor has been a party to the creation of a new tenancy. Such facts may constitute evidence of an assignment, but not of a surrender, and if a surrender may be established by the further proof of a parol agreement between the lessor and the lessee, to which the assignee was not a party, this would be basing the essential fact constituting the surrender upon parol evidence of an express contract, and not deriving it by act and operation of law. In *Frank v. Maquire*,^{*55} it is said: 'It surely is not necessary to cite cases to prove that a tenant is bound by his express contract to pay rent, even after he has

*55 42 Pa. St. 82.

assigned the term with his landlord's assent, and though the landlord has accepted the assignee as his tenant and received rent from him.' In *Creveling v. De Hart*,⁵⁰ an action by a lessor to recover from the lessee for non-payment of rent, a plea was held insufficient which stated that the lessee entered into negotiations with a third party named, and notified the lessor, who encouraged the lessee to sell and assign the lease to a third party, and therefore the lessee duly assigned and conveyed the same to such third party, who entered upon the demised premises and was duly accepted by the lessor as his tenant, and that lessor collected rent from the assignee, and recovered a judgment for rent which afterwards fell due. It was held that to make the plea show surrender in law it needed an averment that the assignee was substituted in place of the original lessee with the intent on the part of the parties to the demise to annul its obligations. In *Grommes v. Trust Co.*,^{*50} is the following language: 'Nor did the sale of the saloon by the tenant to Ruse, nor the taking of possession by Ruse, nor the acceptance of rent from the latter by the landlord, operate as a discharge of the grantors. The assignee of a leasehold estate is liable for rent according to the terms of the lease, and the fact of his liability after the assignment does not discharge the lessee from his covenant to pay rent. In case the rent is not paid by the assignee as it becomes due, an action may be sustained against the lessee therefor; and it makes no difference in this respect that the lessor may have received rent from the assignee, and accepted him as tenant of the premises. Where there is an express covenant to pay rent for a term of years, the mere acceptance of rent by the lessor from the assignee of the lessee does not discharge the lessee. The contract of the latter continues in force, notwithstanding he may have parted with his interest in the estate, unless the lessor enters into such stipulations with the assignee as to accept him as sole tenant and absolve the original lessee. If there be not a substitution of the assignee in place of the original lessee, and

⁵⁰ 54 N. J. Law 338; 23 Atl. Rep. 611.

^{*50} 147 Ill. C34-648; 35 N. E. Rep. 823; 37 Am. St. Rep. 248.

a clear intent to make a new contract with the former and discharge the latter from further liability under the lease, both will be held liable to the lessor. We do not hold it necessary to show an express contract between the lessor and the assignee, but it seems to be requisite to show that the landlord, by his conduct, as between himself and the assignee, does not hold the latter merely to the obligation of an assignee of the term in possession, but has assumed an attitude inconsistent with the continuance of the contract relation between him and the original lessee, and has treated the assignee as his own tenant by substitution."⁵⁷ There must be a surrender, either in fact or by operation of law, of the premises by the lessee and a substitution of his assignee, to release the former from his liability on the covenants of the lease. That result must be attained before the lessee is free from liability.^{*57}

§ 240. Trustee of lessee and not his cestuis que trustent liable.

"In *Walter v. Northern Coal Mining Co.*,⁵⁸ where certain (coal) mines had been leased to a trustee for the defendant company at a fixed or certain rent, and at a tonnage (or ten tale) rent beyond; and the term was for forty years, determinable by the lessee at the end of every third year by giving one year's previous notice; and the defendant company entered into possession and worked the mines under the lease for a little over a year, and then abandoned the mines as unprofitable — never having paid any rent, or given any notice to determine the term; and about nine years afterwards the company went into liquidation, and the liquidator gave the notice to determine the term, protesting also that the lease was not a good lease;

⁵⁷ *Heller v. Dailey*, 28 Ind. App. 555; 63 N. E. Rep. 490.

On the question of substitution, see *Way v. Reed*, 6 Allen 364; *Hoerd v. Hahne*, 91 Ill. App. 514; *Detroit Pharmacal Co. v. Burt*, 124 Mich. 220; 82 N. W. Rep. 893; *Levering v. Langley*, 8 Minn. 107 (Gil. 82); *Lyon v. Reed*, 13 M. &

W. 85; *Lynch v. Lynch*, 6 Irish L. Rep. 131; *Lewis v. Brooks*, 8 Up. Can. Q. B. 576.

^{*57} *Donahoe v. Rich*, 2 Ind. App. 540; 28 N. E. Rep. 1001.

⁵⁸ 25 L. J. Ch. 633; 5 De G. M. and G. 629; 26 L. T. 167; 4 W. R. 140; 2 Jur. (N. S.) 1.

and the plaintiff (the lessor) thereupon commenced this action to recover from the company the alleged arrears of rent, alleging that it was a debt in equity of the company — the court said, that the lessor should have sued the trustee-lessee, and not the company (the *cestui que trust*), the relation being a purely legal relation.” *⁵⁸

§ 241. *Cestuis que trustent* may be liable.

“ If there should be an express contract between the *cestuis que trustent* and the landlord, that he (the landlord) should grant, and that they (the *cestuis que trustent*) or their trustees should accept, the lease, the landlord would in that case be entitled to a specific performance of the contract, and the *cestuis que trustent* would be compelled to fulfil their contract, and (either by themselves or by their trustees) to execute a counterpart of the lease, the landlord having first executed the lease — and after such lease and counterpart had been executed, the legal relations above enumerated would apply as between the landlord and his lessee (and the assignee of the lessee) — but otherwise the *cestuis que trustent* would remain exempt as before, the lessee only (or his assignee) being and remaining liable to the landlord.” ⁵⁹

§ 242. Liability of assignee to his assignor.

Between the assignee and his assignor there is such a privity of contract as renders the latter liable to the former, without an express contract to that effect, for a failure to carry out the covenants or agreements of the lease. If the lessee (the assignor) has to pay the rent falling due after the assignment, he may recover from the assignee the amount paid; and so if the lessee has to carry out any of the covenants, performance of which was to be made, by the terms of the lease, after the time of the assignment, the assignee will be liable to him for his

*⁵⁸ Bainbridge on Mines (5th ed.), p. 294.

⁵⁹ Bainbridge on Mines (5th ed.), p. 294.

failure to perform such covenants.⁶⁰ So the first assignee is liable for the rents accruing, or the covenants to be carried out, after he has assigned the lease; and if he has been compelled to pay or carry out he may recover the amount paid from his assignee; so the assignor (the lessee) may sue such remote assignee for default made during the time he holds the lease.⁶¹ There is an implied promise on the part of each successive assignee of a lease to indemnify the lessee against any breach of a covenant in a lease committed by the assignee during the continuance of his (the assignee's) estate — which implied promise is additional to (and not excluded by) the express covenant of indemnity which each assignee enters into with his own assignor.⁶² The contract, however, between the lessee (the assignor) and the assignee may be such as to modify or relieve the latter from liability to the former, though it cannot relieve such assignee from liability to the lessor for rents or royalties, or the like, accruing during the time he holds the lease.⁶³ But where a second assignee of the lease was to pay a cash sum as the consideration for the assignment, and an additional sum to be paid if oil be found on the premises, it was held that the lessor could not recover such additional sum, after oil was found by him; for the reason that it was merely a bonus to be paid to the first assignee and not a covenant to run with the land.⁶⁴ By no arrangement between the lessee and the assignee can they lessen the liability of the latter to the lessor, or render the assignor's rights less valuable. Thus, where a first lessee sublet a portion of his lease, and the sublessee agreed to drill two wells and pay the first lessee one-fourth of the product from them; and after completing one well, the sublessee procured a lease direct from the owner, which did not require

⁶⁰ *Burnett v. Lynch*, 5 B. and C. 589; 8 D. and R. 368; 4 L. J. (O. S.) K. B. 274; *Humble v. Langston*, 7 M. and W. 517; *Steward v. Wolveridge*, 9 Bing. 60; *Heller v. Dailey*, 28 Ind. App. 555; 63 N. E. Rep. 490.

⁶¹ *Brinkley v. Hambleton*, 67 Md. 169; 8 Atl. Rep. 904; *Knupp v.*

Bright, 186 Pa. St. 181; 40 Atl. Rep. 414.

⁶² *Moule v. Garrett*, L. R. 5 Exch. 132; 39 L. J. Exch. 69; 22 L. T. 343; 18 W. R. 697.

⁶³ *Fisher v. Guffey*, 193 Pa. St. 393; 44 Atl. Rep. 459.

⁶⁴ *Fisher v. Guffey*, *supra*.

two wells to be dug, nor the payment of royalties if they were dug, it was held that this second lease was a fraud upon the first lessee.⁶⁵

§ 243. Assignor liable on account of lease as a surety.

The assignment of the lease does not release the assignor from the fulfillment of the covenants or engagements contained in it; and while the assignee continues to enjoy it, such assignor is in the position towards him of a surety, and such assignee is regarded in fact as the principal debtor.⁶⁶ Even though the lessor accept the assignee as a tenant that will not release the lessee from his covenant to pay rent or royalties; but his liability continues by privity of contract until the lease shall terminate.⁶⁷ The collection of rent from the assignee or sub-

⁶⁵ *Akin v. Marshall Oil Co.*, 188 Pa. St. 602; 41 Atl. Rep. 748; *Washington Nat. Gas Co. v. Johnson*, 123 Pa. 576; 16 Atl. 799; *Woodlawn Oil Co. v. Crawford*, 55 Ohio St. 161; 44 N. E. 1093; 36 Ohio L. Bull. 231; 34 L. R. A. 62; *Burton v. Forest Oil Co.*, 204 Pa. 349; 54 Atl. 266; *Breckenridge v. Parrott*, 15 Ind. App. 417; 44 N. E. 66.

Contract giving D. exclusive right to drill in defendant's land with a view of finding commercial substances, and in case of success within ninety days thereafter to pay defendant \$100 per arpent for a conveyance of the land, does not impose a personal obligation on D. within Laurence Civil Code, art. 2000, declaring an obligation personal when the obligor undertakes to perform anything that requires his personal skill and attention; and hence the contract was assignable. *Anse La Butte (Le Danois) Oil & Mineral Co. v. Babb*, 122 La. 415; 47 So. 754.

Where the assignor has an adequate remedy at law, he cannot re-

scind his assignment for breach of a covenant to pay royalties. *Kidder v. Adrian Petroleum Co.*, 156 N. Y. Supp. 519.

⁶⁶ *Burnett v. Lynch*, 5 B. and C. 589; 8 D. and R. 368; 4 L. J. (O. S.) K. B. 274; *Humble v. Langston*, 7 M. and W. 517; *Washington, etc., Gas Co. v. Johnson*, 123 Pa. St. 576; 16 Atl. Rep. 799; 16 Morr. Min. Rep. 165; *Heller v. Dailey*, 28 Ind. App. 555; 63 N. E. Rep. 490; *Consolidated Coal Co. v. Peers*, 150 Ill. 344; 37 N. E. Rep. 937; *Sanders v. Sharp*, 153 Pa. St. 555; 25 Atl. Rep. 524; *Houston v. Hill (Va.)*, 87 S. E. 573 (assignment to a corporation to be formed).

⁶⁷ *Bonetti v. Treat*, 91 Cal. 223; 27 Pac. Rep. 612; *Creveling v. DeHart*, 54 N. J. L. 338; 23 Atl. Rep. 611; *Fisher v. Milliken*, 8 Pa. St. 111; *Grommes v. St. Paul Trust Co.*, 147 Ill. 634; 35 N. E. Rep. 823; 37 Am. St. Rep. 248; *Frank v. Maquire*, 42 Pa. St. 77; *Heller v. Dailey*, 28 Ind. App. 555; 63 N. E. Rep. 490; *Harris v. Heachman*, 62 Ia. 411; 17 N. W. Rep. 592; *Shaw v. Patridge*, 17 Vt. 626; *Way v. Reed*,

tenant will not amount to a surrender.⁶⁸ Nor can the assignee relieve himself from liability for a year's rent by surrendering the lease before the end of the year, for which the rent is to be paid, because of the failure to complete an oil or gas well, in the absence of any agreement to release or acquit the payment.⁶⁹

§ 244. Sublease.—Liability of sublessee.

A sublease is always less than the lease of the sublessor; it is only a part of the lease. Or, in other words, if the lessee parts with all his estate except such as he reserves, however small the reservation may be, this amounts to a sublease; while if he part with the whole leasehold estate, it will be an assignment. Some interest in the part of the premises sublet must remain in the lessee; hence if he assign a distinct portion of the premises—as one-half, by metes and bounds—it is an assignment and not a subletting.⁷⁰ If, however, as an illustration, a lease be for ten years, and the lessee should demise a distinct part or the whole of it for six years, that would be a subletting and not an assignment.⁷¹ Unlike the assignee of a lease, there is no privity of estate between the original lessor and a sublessee, and the latter is not liable to the former for any part of the rent due him nor for the performance of the covenants in

6 Allen 364; *Hoerd v. Hahne*, 91 Ill. App. 514; *Detroit Pharmacal Co. v. Burt*, 124 Mich. 220; 82 N. W. Rep. 893; *Charles v. Froebel*, 47 Mo. App. 45; *Lewis v. Brooks*, 8 Up. Can. Q. B. 576; *Levering v. Langley*, 8 Minn. 107.

⁶⁸ *Jones v. Barnes*, 45 Mo. App. 590.

⁶⁹ *Breckenridge v. Parrott*, 15 Ind. App. 411; 44 N. E. Rep. 66.

A lessee of a gas lease was to pay a certain royalty. He assigned an undivided one-half interest therein to a corporation, to hold subject to the royalty contained in the lease, and thereafter assigned the other one-half interest to a second

company. The first corporation operated the land under an agreement to account to the second company for one-half of the proceeds, the latter company to pay one-half of the expenses. It was held that the first company was liable for the entire royalty. *Burton v. Forest Oil Co.*, 204 Pa. 349; 54 Atl. Rep. 266.

⁷⁰ *Palmer v. Edwards*, Doug. 187, note; *Sands v. Hughes*, 53 N. Y. 287; *Bedford v. Terhune*, 30 N. Y. 457; *Boardman v. Wilson*, L. R. 4 C. B. 57.

⁷¹ *Post v. Kearney*, 2 N. Y. 394; *Pingrey v. Watkins*, 15 Vt. 479; *Collins v. Hasbrouck*, 56 N. Y. 157; 15 Am. Rep. 407.

the original lease.⁷² But the terms of the original lease must be carried out, either by the lessee or the sublessee, or the original lessor will have a right to terminate the lease, or have right of action for damages, as the case may be.⁷³ Of course, if a sublessee is accepted by the original lessor as his tenant, he then becomes liable to him the same as if he had his lease directly from such lessor.⁷⁴ If the original lease contain a prohibition against subleasing, it will not prevent an assignment; and so, *vice versa*.⁷⁵ If a subletting be prohibited by the original lease, a violation of it in this respect will give the original lessor a right to have such original lease canceled;⁷⁶ which, of course, would carry down with it the sublease. But the lease is not avoided merely because there has been an assignment or subletting contrary to its provisions; it is merely voidable, at the option of the original lessor.⁷⁷ If the lessor accepts rent of the assignee or sublessee, after the assignment or subletting, with knowledge of such assignment or subletting, he will waive the right to re-enter and declare the original lease avoided.⁷⁸ A sale by the lessees of an oil or gas well, of all the oil or gas pumped or flowing from it, to a company taking charge of it and conducting the oil or gas off the premises, is not an assignment but a subletting.⁷⁹ In such an instance, equity has power to entertain a bill for discovery to ascertain the rights and relations of the parties to the lease and sublease, and to compel an accounting for the profits from the sale of oil and gas.⁸⁰ Under a right to sublet and subdivide, a lessee may release a part of the premises set off in partition to one of several tenants in com-

⁷² Halford v. Hatch, Dougl. 187; Dartmouth College v. Clough, 8 N. H. 22; McFarlan v. Watson, 3 N. Y. 286; Gibson v. Mullican, 58 Tex. 420; Jennings v. Alexander, 1 Hilt. (N. Y.) 154; Fulton v. Stuart, 2 Ohio 215.

⁷³ Elms v. Randall, 4 Dana 519.

⁷⁴ Stimmel v. Walters, 2 Bush. 282.

⁷⁵ Greenway v. Adams, 12 Ves. Jr. 395; Bockover v. Post, 25 N. J. L. 285; Lynde v. Hough, 27 Barb. 415; Hargrave v. King, 5 Ired. Eq. 430.

⁷⁶ Stimmel v. Waters, 2 Bush. 282.

⁷⁷ Collier v. Cunningham, 2 Ind. App. 254; 28 N. E. Rep. 341; Jackson v. Groat, 7 Cow. 285; Cooney v. Hayes, 40 Vt. 478; Burnes v. McCubbin, 3 Kan. 221; Eldredge v. Bell, 64 Ia. 125; 19 N. W. Rep. 879; Shattuck v. Lovejoy, 8 Gray 204.

⁷⁸ O'Keefe v. Kennedy, 3 Cush. 325; Heeter v. Eckstein, 50 How. Pr. 445; Murray v. Harway, 56 N. Y. 337.

⁷⁹ Akin v. Marshall Oil Co., 188 Pa. St. 602; 41 Atl. Rep. 748.

⁸⁰ *Ibid*.

mon, and retain the lease in operation upon the remainder of the land.⁸¹

§ 245. Ejectment.

The assignee of an oil lease, with the right to enter on the premises described in the lease, to mine for oil and gas, cannot maintain ejectment against the lessee in a subsequent lease.⁸²

§ 246. Lessee denying landlord's title.

A lessee, in an action to recover rents, will not be permitted to deny his landlord's title so long as he occupies the premises. Thus, where oil land was sold for taxes, and before the expiration of the period for redemption the owner executed an oil lease, and thereafter another person purchased and took title to the land by deeds from the purchasers at the tax sale, which deeds were made subject to the oil lease, and such person then took an assignment of the oil lease, it was held that he could not set up the title to the land which he had obtained by the deeds against the lessor in an action to recover royalties under the lease.⁸³

§ 247. Liability of a trustee assigning a lease.

Generally, an ordinary trustee, though describing himself as such and signing as trustee, will be bound personally, unless he limits the contract to exclude himself personally. But that is not so with trustees appointed on dissolution of a corporation, who are only the arm of a court in the exercise of a power in which they have no personal interest, and in such cases, to bind them personally, the contract must be so expressed. Thus, where trustees in proceedings to dissolve an oil company, covenanted that they had good and lawful au-

⁸¹ Blair v. Northwestern, etc., Co., 12 Ohio Cir. Ct. Rep. 78; 5 Ohio C. D. C. 620.

Where a lease of lands gives the lessee a subsisting estate for years, he may sublet the premises. Chandler v. Hart (Cal.), 119 Pac. 516.

⁸² Gillespie v. Fulton Oil & Gas Co., 236 Ill. 188; 86 N. E. Rep. 219.

⁸³ MacDonald v. O'Neil, 21 Pa. Super Ct. Rep. 364.

thority to assign a lease, it was held, assuming the words of the covenant meant the same as the technical words "good right to convey," that the trustees, in view of their official character, were not personally liable on the covenant, the covenant being only an assurance of their official character, and of their due appointment and authority. It was also held that the corporation was not liable under the assignment.⁸⁴

§ 248. Prior lease or contract by lessor.—Lessee as an innocent purchaser.

An assignee of a lease who has knowledge of a prior lease is chargeable with notice of its terms.⁸⁵ Thus where the purchaser of a lease knew that his vendor had contracted that the oil produced on the property should be sold and delivered to a particular pipe line company at a price named in the sale contract, it was held that he was bound by the terms of the contract, and could be compelled by a mandatory injunction to deliver the oil to the company.⁸⁶ Where an assignment of an oil lease required the consent of the lessor and the instrument by which such consent was granted recited the execution of a prior lease by the lessor, and bound the assignee to defend any suit thereon, and also provided that its conditions should be binding on the assignee of the parties, a subsequent assignee, which assumed the obligation of its assignor, was held not an innocent purchaser without notice with respect to such prior lease.⁸⁷ If an assignee knows of a prior lease and the assignment to him of the lease he claims under is only of all the assignors' "right, title and interest" under the lease, then there is no warrant of title, the rule that the seller of personality impliedly warrants his title to it has no application.⁸⁸ In an action to recover the agreed consideration for the assignment of a lease, the assignee may show in defense a prior lease on the same premises of which he had no notice, but in return the assignor may show that the

⁸⁴ Shannon v. Mastin, 135 Mo. App. 50; 114 S. W. Rep. 1127.

⁸⁵ Mexico-Wyoming Petroleum Co. v. Valentine, 237 Fed. 539.

⁸⁶ Simms v. Southern Pipe Line Co. (Tex. Civ. App.), 195 S. W. 283.

⁸⁷ Mexico-Wyoming Petroleum Co. v. Valentine, 237 Fed. 538.

⁸⁸ Tupeker v. Deans (Okla.), 148 Pac. 853.

prior lease was void or had been forfeited, abandoned or had lapsed.⁸⁹

**§ 249. Lessee impliedly covenanting not to assign lease.—
Reassignment.**

Where an oil lessee assigns a part of his interest in a lease and agrees with his assignee to pay the delayed rentals and to notify him before permitting the lease to lapse, he impliedly covenants not to dispose of the lease to a stranger without such assignee's consent.⁹⁰ An assignment of leasehold rights in oil lands, containing a covenant to pay royalties to the assignor, running with the land and attaching to the production of the first well, whoever the owner thereof was, contemplates a re-assignment.⁹¹ The assignor of leasehold right in oil lands, with a covenant against reassignment before the payment of the purchase money notes, and a right to rescind upon their non-payment after their payment in full, has no ground for rescinding his assignment.⁹²

⁸⁹ *Eastern Oil Co. v. Holcomb*, 128 C. C. A. 642; 212 Fed. 126.

In an assignee's suit to quiet title and enjoin the lessor from executing a second lease, the assignor is not a necessary party if the assignment is absolute. *Castle Brook Carbon Block Co. v. Farrell*, 76 W. Va. 300; 85 Atl. 544.

In an assignment of an oil lease subject to the terms and conditions of a former lease, the words "subject to" are words of qualification and not of contract. *Cox v. Butts* (Okla.), 149 Pac. 1090.

A covenant in the assignment of a part interest in an oil and gas lease not to dispose of the lease to a stranger without the consent of the assignee, is personal and does

not pass by a transfer of the lease by the covenantor to a stranger so as to bind him. *Millan v. Bartlett* (W. Va.), 89 S. E. 711.

A petition to validate an oil lease and cancel another one is demurrable, where it shows that the plaintiff has been guilty of a breach of contract. *Wellsville Oil Co. v. Miller* (Okla.), 145 Pac. 344.

⁹⁰ *Milland v. Bartlett* (W. Va.), 89 S. E. 711.

⁹¹ *Kidder v. Adrian Petroleum Co.*, 155 N. Y. Supp. 519.

⁹² *Kidder v. Adrian Petroleum Co.*, 156 N. Y. Supp. 519. In this case the complaint was held insufficient to secure a cancellation of the assignment.

CHAPTER VII.

RENTS AND ROYALTIES.

- § 250. Limitations of chapter.
- § 251. Construction of leases.
- § 252. Various methods of fixing rents or royalties.
- § 253. A royalty is rent.—“Mining rent.”
- § 254. Definition of rent and rent charges.
- § 255. Payment so much per well.
- § 256. Royalty, percentage of profits or income.
- § 257. Payment of operating expenses first.—Free gas.
- § 258. Free gas.
- § 259. Royalty in gas or oil used to operate leased premises.
- § 260. When royalty due.—Removal of oil from premises.
- § 261. When rent is due for failure to develop land.
- § 262. To whom payable.—Joint lessors.
- § 263. Payment of rent to procure right to mine.—Tender.
- § 264. Damages for failure to deliver lessor his share.
- § 265. Interest on royalties.
- § 266. Waiver.—Parol evidence.
- § 267. Surrender.—Tract “retained.”
- § 268. Interdependent conditions.
- § 269. New lease.
- § 270. Termination of lease by failure to keep its terms.
- § 271. Lessee cannot avoid payment by taking advantage of forfeiture clause.
- § 272. Forfeiture clauses and liability for rent.
- § 273. Surrender of lease necessary to escape liability for rent.
- § 274. Eviction.
- § 275. Rent to be paid if well not drilled.
- § 276. Minimum production allowed.
- § 277. Consideration for lease may be purchase money.
- § 278. Consideration for grant part of minerals, creates an exception.
- § 279. One well draining two tracts of land.
- § 280. Oral change of lease discharging or changing rents.
- § 281. Failure of oil, royalty ceases.
- § 282. Rent for exhausted well.—Flooded well.
- § 283. Instances of lessee's liability.
- § 284. Account rendered.
- § 285. How collected.
- § 286. Lien of royalty accruing during receivership.
- § 287. Assignment of lease does not carry oil in tank on premises.

§ 250. Limitations of chapter.

The discussion of the subject of Rents and Royalties in this chapter must necessarily be limited, in order to avoid repetitions. The questions involved here are so intimately bound up with the subjects discussed in other chapters, that it is impossible to discuss all the cases without unnecessarily increasing the size of this volume. Under the chapters on "Duration of Leases," "Mortgagor and Mortgagee," "Life Tenants," "Forfeitures," "Assignments," will be found many cases on the subject of Rents and Royalties, that are pertinent to the several subjects of those chapters.

§ 251. Construction of leases.

In discussing the right of a lessor to rent or royalties, it must be borne in mind that oil and gas leases are usually construed favorably, in this respect, to the lessor, if there be a doubt concerning the right to rent or royalty, and its amount. The general rule is undoubtedly that a deed is construed most strongly against the grantor and in favor of the grantee. But such is not the case in an instance of an oil or gas lease; and the reason for this arises out of the well known transactions of oil and gas operators. These contracts are looked upon somewhat in the same light as contracts of insurance. By long experience insurance companies have been enabled to draw a policy which is often difficult to determine just what their liability may be. They have their attorneys who have spent years in studying contracts of insurance and the decisions of the courts, until they have become thoroughly versed in all phases of such contracts. On the other hand, the insured is usually without advice when entering into a contract of insurance, and he is almost universally ignorant of the rules of law applicable to such obligations. To such an extent is this true that the courts have adopted a construction, in cases of doubt or obscurity, favorable to the insured. What is true of insurance contracts, may be said to be true of oil or gas leases (if not of mining leases). The lessor usually knows nothing of the law applicable to such

instruments; while the operator is usually well informed. Years of experience have shown the operator how to draw a lease giving him many advantages, of which the lessor has not even thought. For this reason the courts have adopted a rule to the effect to construe an oil or gas lease most favorably to the lessor, where its terms can be so construed without doing violence to the language used.¹ If the lessor and lessee have put a construction upon the lease, as evidenced by their acts, the courts will adopt that construction.^{1a} Contemporaneous acts of the parties may be examined to discover the construction they have placed on the lease.^{1b} And the construction put on the lease by the lessor and his successor in title cannot be changed by a subsequent purchaser, if the statute of limitations has fully run.^{1c} The language of the lease or oil contract will also be given its ordinary and commonly understood meaning where no reason appears for doing otherwise;^{1d} and it will not be held void for ambiguity when the contract of the parties can be ascertained from the language used in it.^{1e}

§ 252. Various methods of fixing rents or royalties.

There are various methods in vogue in fixing the rents or royalties that shall be paid for a mining or oil lease. Thus, the rent may be (1) a fixed sum; or an (2) annual or other periodical sum; or (3) a royalty on the amount of the minerals or

¹ *Steelsmith v. Gartlan*, 45 W. Va. 27; 29 N. E. Rep. 978; 44 L. R. A. 107; *Huggins v. Daley*, 99 Fed. Rep. 606; 48 L. R. A. 320; *Dill v. Frazee*, 169 Ind. 53; 79 N. E. Rep. 971; *Ringle v. Quigg*, 74 Kan. 581; 87 Pac. Rep. 724; *Logansport & W. V. Gas Co. v. Null*, 36 Ind. App. 503; 76 N. E. Rep. 125; *Ramage v. Wilson*, 37 Ind. App. 532; 77 N. E. Rep. 368; *Smity v. South Penn. Oil Co.*, 42 W. Va. 614; 53 S. E. Rep. 152; *Stahl v. Illinois Oil Co.*, 45 Ind. App. 211; 90 N. E. Rep. 632; *Conkling v. Krandsky*, 127 N. Y. App. 761; 112 N. Y. Supp. 13.

^{1a} *Scott v. Lafayette Gas Co.*, 42

Ind. App. 614; 86 N. E. Rep. 495; *Smith v. South Penn. Oil Co.*, 59 W. Va. 204; 53 S. E. Rep. 152; *Stahl v. Illinois Oil Co.*, 45 Ind. App. 211; 90 N. E. Rep. 632.

^{1b} *Ramage v. Wilson*, 37 Ind. App. 532; 77 N. E. Rep. 368.

^{1c} *Gillespie v. Iseman*, 210 Pa. 1; 59 Atl. Rep. 266; *Indiana Natural Gas & Oil Co. v. Leer*, 34 Ind. App. 61; 72 N. E. Rep. 283.

^{1d} *Collier v. Munger*, 75 Kan. 550; 89 Pac. Rep. 1011.

^{1e} *Ringle v. Quigg*, 74 Kan. 581; 87 Pac. Rep. 724; *Swift v. Occidental M. & P. Co.*, 141 Cal. 161; 74 Pac. Rep. 700.

oil mined or produced, payable at fixed intervals or times; or (4) a royalty, not, however, less in the aggregate than a specified sum each year; or (5) a royalty accompanied by a covenant to mine a certain minimum amount or pay a certain sum thereon; or (6) in case of a gas lease, to bore so many wells and pay so much a well, or forfeit a certain sum per well for a failure to bore the required number; or (7) in case of an oil lease, to pay a certain percentage of the oil taken out of the premises. It is believed that these divisions practically cover all methods used in fixing the amount the lessee shall pay the lessor, aside from the covenants to erect improvements on the leased lands, or make repairs, or develop the premises leased.

§ 253. A royalty is rent.—“Mining rent.”

Royalty is another term for rent, but is limited (except such as given an author for the privilege of publishing his book, or a patentee for the use of a patent) to rents due for the right or privilege of taking minerals, oil or gas out of a designated tract of land. In the discussion hereafter, a distinction will be drawn between “rent” as such and “purchase money” under an instrument selling mineral and oil beneath the surface of a specified tract; and in such an instance whatever would not be a “rent” cannot be a “royalty,” but must be “purchase money.” In practice the term “mining rent” is used to designate the consideration given for a mining lease, whether such lease creates a tenancy, conveys a fee, or grants an incorporeal right or a mere license. Its true significance must be read or determined in connection with the rights granted.² So care must be taken to distinguish between rent and royalty in connection with gas and oil leases. Rent is the term applied to the privilege given to bore for gas and oil and for delay in beginning operations; while royalty is a certain percentage of the oil after it is found, or so much per gas well developed. Even in the latter instance the amount

² Where royalty on coal was considered part of the *corpus* of the estate and not a profit issuing out of it, see Duff's Appeal, 21 W. N.

C. 490; Hope's Appeal, 3 Atl. Rep. 23; 2 Cent. Rep. 43; 33 Pittsb. L. J. (N. S.) 270.

to be paid may be regulated by the amount of the pressure of the gas.^{2a}

§ 254. Definition of rent and rent charges.

Rent has been defined as "a certain profit issuing yearly out of lands," as "return to the landlord for their annual use."³ Again: "Rent is a sum stipulated to be paid for the actual use and enjoyment of another's land, and is supposed to come out of the profits of the estate."⁴ A more extensive definition is as follows: "Rent, or render, reditus, signifies a compensation, or return, it being in the nature of an acknowledgment or recompense given for the possession of some corporeal inheritance. It must be a certain profit issuing out of lands and tenements corporal: that is, from some inheritance whereunto the owner or grantee of rent might (anciently) have recourse to restrain."⁵ A rent charge has been defined as "a rent granted out of lands by him who is the owner thereof, with an express clause of distress" and the reason assigned for this definition is because the lands were charged with the distress, and the grantee, without the clause, had no right of distress, because there was no fealty annexed to the grant."⁶ In another case it is said that a "rent charge is a rent reserved where the landlord has no reversionary interest. He would have," it was said, "for such rent, no right to distrain, unless the power be contained in the lease."⁷ And a rent charge has been distin-

^{2a} *Headley v. Hoopengartner*, 60 W. Va. 26; 55 S. E. Rep. 744. Covenants to pay royalty run with the land, and bind the assignee of the land to the lessor for the payment of all royalties which accrue while he holds an assignment of the lease. *Fennell v. Guffey*, 139 Pa. 341; 20 Atl. 1048.

The consideration for the grant to the lease by the lessor of the oil interests is the receipt of and the delivery to the lessor of the royalties provided for by the lease. *Lowther Oil Co. v. Miller-Sibley Oil Co.*, 53 W. Va. 501; 44 S. E. 433; 97 Am. St. 1027; *Parish Fork Oil Co. v. Bridgewater Gas Co.*, 51 W. Va. 583; 42 S. E. 655; 59 L. R. A. 566; *Lawson v. Kirchner*, 50 W.

Va. 344; 40 S. E. 344; *Steelsmith v. Gartlan*, 45 W. Va. 27; 29 S. E. 978; 44 L. R. A. 107; *Crawford v. Ritchie*, 43 W. Va. 252; 27 S. E. 220; *Funk v. Halderman*, 53 Pa. 229; *Florence Oil Co. v. Orman*, 19 Colo. App. 79; 73 Pac. 728; *Venture Oil Co. v. Fretts*, 152 Pa. 451; 25 Atl. 732; *Kelley v. Keys*, 213 Pa. 219; 62 Atl. 911.

³ *Boyd v. McCombs*, 4 Pa. St. 146.

⁴ *Marsh v. Butterworth*, 4 Mich. 575.

⁵ *Van Wicklen v. Paulson*, 14 Barb. 654. See *Bloodworth v. Stevens*, 51 Miss. 475; *Zonehe v. Dalbaie* L. R. 10 Exch. 177; *People v. Van Rensselaer*, 8 Barb. 189.

⁶ *Spencer v. Austin*, 38 Vt. 258.

⁷ *Cornell v. Lamb*, 2 Cow. 652.

guished from an annuity by saying that a "rent charge is a burden imposed upon and issuing out of lands, whereas an annuity is chargeable only upon the person of the grantor."⁸ By these definitions it will be observed that rent, strictly speaking, is not a part of the real estate, but is profit issuing out of it. It will be necessary to bear these definitions in mind in determining the status of a rent or royalty reserved for the right to dig minerals or take oil or gas out of lands.

§ 255. Payment so much per well.

Occasionally a provision in a lease provides that the lessor's compensation shall be so much per well drilled or to be drilled. This is more frequently the case with respect to gas than oil wells; but occasionally it is applied to the latter. Thus a lease for gas and oil provided if gas only be found, the lessee should pay a stipulated sum per annum for each well "while the same is being used off the premises," but contained no clause inconsistent with this provision. It was held that the lessee was not required to pay such sum for a gas well whose product was not used, even though it might be used off the premises without loss to the lessee.⁹ In the printed part of a lease it was stipulated that the lessee should have the exclusive

⁸ *Wagstaff v. Lowerre*, 23 Barb. 209.

⁹ *Ohio Oil Co. v. Lane*, 59 Ohio St. 307; 52 N. E. Rep. 791; *Shoemaker v. Hamilton Oil Co.*, 29 Ind. App. 312; 62 N. E. Rep. 708.

But where the lessee or grantee was to pay a stipulated rental while gas was transported or used off the premises, it was held that after he had completed a well which produced gas in great quantities he could not refuse to transport the gas for the sole purpose of wrongfully evading the payment of the rentals. *Pittsburg-Columbia Oil & Gas Co. v. Broyles*, 46 Ind. App. 3; 91 N. E. Rep. 754 (for a complaint, see this case).

In an action to recover rentals under a gas lease, where it was al-

leged that gas was found in sufficient quantities to be marketed and to be piped to a market, and that there were good markets for the gas within ten miles, and at other places further away, to which the gas could be delivered and sold at a profit to defendant, the amount of gas produced in any well, cost of production, and cost of transportation to market were evidentiary facts to be proved in support of the ultimate facts alleged, and need not be pleaded. *Indiana Natural Gas & Oil Co. v. Wilhelm*, 44 Ind. App. 100; 86 N. E. 86.

An oil and gas lease provided that the lessee could terminate the lease at any time by notice in writing and by surrendering the same and discharging it of record, and that the

right to drill wells and operate them on a small plot of ground, for which it was to furnish gas for four residences, free of charge, so long as gas was obtained in paying quantities, and to pay a rental of two hundred dollars a year for each well completed. In the written portion it was stipulated that of the well rental, one hundred dollars should be paid in cash and one hundred dollars in gas. The cash payment was to be annually in advance, beginning with a certain date, to quote, "whether a gas well is drilled or not. The gas payment above named begins with this date," which was the date of the lease. The contract was carried out for two years according to the provisions in the written stipulations. A contention arising between the lessor and lessee, it was held that the cash and gas

lessee should pay a stipulated rental each year until the royalties from the sale of the oil and gas equal the rental stipulated. It was held that the lessor was entitled to the amount of the rent agreed on as long as the lease remained in force, and the royalties did not equal that amount. The lessee completed eight producing wells and sold all the machinery which the purchaser proceeded to remove. The lessor brought an action to enjoin the removal and to cancel the lease which action was pending for a year, during which the removal was restrained by an injunction. The lessor was allowed an injunction provided he paid the lessee the value of the machinery, otherwise the injunction was denied. After this litigation ended the lessor brought an action for rent pending the injunction proceedings. It was held that the fact that he did not succeed in his action was not sufficient to defeat his action for rent. *Shertzer v. Myers*, 82 Kan. 275; 108 Pac. Rep. 105.

In an action for rentals under a gas lease giving the lessor a certain sum per well if gas were produced in sufficient quantities to make it marketable, where the wells were already producing oil in marketable

quantities, the original cost of drilling the wells was not to be considered in determining whether the gas produced could be profitably marketed, but the only expense chargeable to the gas would be that of operating and marketing it, including the rental therefor. *Indiana Natural Gas & Oil Co. v. Wilhelm*, 44 Ind. App. 100; 86 N. E. 86.

A lease for oil and gas provided that, if gas only was found and the same was marketed off the premises, lessee agreed to pay a specified amount per pound per annum, payable semi-annually in advance, *for each pound registered in one minute on the casing at the well, six months from date of completion*. No test of the pressure was made by lessee at the time appointed by the lease, but, based on the pressure ascertained at the time of completion of the well, lessee paid lessor the first semi-annual installment of rent for the gas shortly after the pressure had been so ascertained. It was held, in an action for the second installment of rent, that it would be presumed, until the contrary was shown, that the pressure in the well continued as shown at the completion thereof. *Moore v. Ohio Valley Gas Co.*, 63 W. Va. 455; 60 S. E. 401.

payment were to be paid annually, whether a gas well was drilled or not.¹⁰ It is no defense to an action for rent, on a lessee's failure to drill more than two wells, where a lease required him to drill three wells within a specified time, or pay a year's rent, and also pay for all marketable wells two hundred dollars, that to drill a third well would destroy the other two, and would be of no use.¹¹ Where for the first well so much was to be paid if it produced a specified amount of oil, and so much more if the amount was greater; and if a second well was put down, a specified additional amount; and the first well failed, but the second was productive, it was held that the lessee must pay the additional sum for the second well, as provided for in the lease, even though the first well failed.¹² A lease provided that a well should be drilled within sixty days, a second within four months, a third within eight months, and a fourth within a year, the lessee "to pay one hundred and fifty dollars for each location," the location to be selected by both the lessor and lessee. The lessee was to hold fifteen acres only for each well drilled, unless they were all completed as agreed. The lease was held not to require the payment of location money for any well drilled in addition to the four provided for, for the reason that the lessee, on the completion of the four, was entitled to the oil right to the entire tract, and in that event an increased number of wells would benefit the lessor.¹³ Where a lease for oil and gas not only reserves as royalty one-eighth of all the oil produced, but also a stipulated sum "for each and every gas well drilled on said premises," the "payment to be made on each well within sixty days after a well is completed, and to be paid yearly thereafter while it is a gas well," the right of the lessor to pay for the gas well does not necessarily depend on whether the particular lessee or some operator can

¹⁰ Kokomo, etc., Gas Co. v. Albr'ght, 18 Ind. App. 151; 47 N. E. Rep. 682.

¹¹ Young v. Equitable Gas Co., 5 Pa. Super Ct. 232; 28 Pittsb. L. J. (N. S.) 75; 41 W. N. C. 24.

¹² Brushwood, etc., Co. v. Hickey (Pa.), 16 Atl. Rep. 70.

¹³ Ft. Orange Oil Co. v. Wichman, 17 Ohio Cir. Ct. Rep. 57; 9 Ohio Dec. 650; reversing 4 Ohio N. P. 407.

As to release of rent per well and substitution of another rent, by changing the number of wells, see Mecker v. Browing, 9 Ohio C. D. 108; 17 Ohio C. C. 548; and Hunter v. Apollo Oil and Gas Co. (Pa.), 54 Atl. Rep. 274.

A gas and oil lease provided that the lessee should deliver to the les-

sor one-sixth of all the oil produced and saved from the premises, and pay \$100 yearly for each well from which gas was transported or used off the premises. It was held that the lessee must deliver the specified part of the oil produced and saved, and where the oil wells also produced gas, the delivery of the one-sixth of the oil did not prevent a recovery of the \$100 per well. Pittsburg-Columbia Oil & Gas Co., 46 Ind. App. 3; 91 N. E. Rep. 754. (See this case for a complaint.)

A lease providing for the successive drilling of four wells within specified times, and providing that for each location, when made, the lessee should pay \$150, requires the location money to be paid, not only for the four wells expressly provi-

market the gas off the premises, but whether the well is a gas well within the proper meaning and intention of the contract.^{13a} Nor will the fact that a particular well is an oil well and is operated as such and produces large quantities of oil, and the royalty oil reserved is paid the lessee, if in fact and within the true intent and meaning of the contract the well is also a well from which gas might be produced and sold at a profit.^{13b} Nor will the fact that a particular well is an oil well and is operated as such and produces large quantities of oil, and the royalty oil reserved is paid the lessee, if in fact and within the true intent and meaning of the contract the well is also a well from which gas might be produced and sold at a profit.^{13c}

§ 256. Royalty, percentage of profits or income.

The word "profit" used in an agreement to pay a certain portion "of all the profits realized from oil or gas" found on the leased premises, means the net amount realized after deducting the expenses, and is not the equivalent of "income."¹⁴ Where the agreement was to give a certain portion of the profits

ded for, but for every well drilled beyond that number. *Wichman v. Ft. Orange Oil Co.*, 4 Ohio N. P. 407.

Where a lease of oil lands provided that in case no well was completed within sixty days from date the grant should be null and void, unless the lessee should pay to lessor \$1 per day in advance for each day thereafter such completion was delayed, and that lessee should drill a well at the rate of one well every sixty days after date, until five wells were completed, and in case any well was not completed in sixty days the lessee should pay \$1 per day in advance until the said well was completed, and only two wells were completed, the first provision applied only to the first well, and under the last provision the lessee was liable for \$1 per day on each well not drilled within their respective sixty-day periods from the date of the contract. *Dailey v. Heller*, 41 Ind. App. 379; 81 N. E. 219.

Under a gas lease providing for a graded scale of royalty based on a minimum pressure, but silent as to use of or payment for gas while the pressure was below the minimum, it was held that the lessor was not entitled to pay for gas produced

below the minimum pressure and marketed by the lessee. *Addleman v. Manufacturer L. & H. Co. (Pa.)*, 100 Atl. 446.

The act of the lessee in converting into gasoline, to the mutual advantage of both contracting parties, a part of the oil which previously had been wasted by evaporation, held not to convert oil wells into gas wells so as to render him liable for gas-well rentals. *Locke v. Russell*, W. Va. 84 S. E. 948.

^{13a} *Prichard v. Freeland Oil Co. (W. Va.)*, 93 S. E. 871.

^{13b} *Prichard v. Freeland Oil Co.*, *supra*; *Mathes v. Shaw Oil Co.*, 80 Kan. 181; 101 Pacific 998; *Natural Gas & Oil Co. v. Wilhelm*, 44 Ind. App. 100; 86 N. E. 86.

^{13c} *Prichard v. Freeland Oil Co.*, *supra*; *Mathes v. Shaw Oil Co.*, 80 Kan. 181; 101 Pac. 998; *Natural Gas & Oil Co. v. Wilhelm*, 44 Ind. App. 100; 86 N. E. 86.

¹⁴ *Potterie Gas Co. v. Potterie*, 179 Pa. St. 68; 36 Atl. Rep. 232.

Royalty generally refers to "a share of the product or profit reserved by the owner for permitting another to use the property." *Indiana Natural Gas & Oil Co. v. Ganaird*, 45 Ind. App. 613; 90 N. E. Rep. 384.

of all gas "conducted off the premises, for use or sale," above the costs, all expenses, including cost of pipes and materials, and payment for right of way and for employees' salaries, must be deducted from the sales.¹⁵ If there be no net profits, in such instances, the lessee is not liable, not even if he permit another to work the premises with the same understanding, who fails to realize profits, if the lease does not prohibit subletting.¹⁶ But where the royalty was fixed at a certain portion of the oil to be delivered, free of expense, in tanks or pipe lines, and on gas "at the rate of one-eighth of income dollars per year," it was held that the "income" referred to is the gross, not the net income.¹⁷ The legal effect of a provision in a deed excepting and reserving out of and from a grant at all times thereafter and forever, unto the grantor, his heirs and assigns one-tenth of all the mineral oil that may be obtained by the grantee, his heirs and assigns, from the land granted, to be delivered on the land to the grantor, his heirs and assigns, his or their agent, free of expense, except the furnishing of barrels or other means of transportation, is to except and reserve in the grantor, his heirs and assigns, to be delivered as stipulated, a royalty of one-tenth of all the oil produced, possessing the same quality of estate as royalty received in an ordinary lease for oil and gas purposes. If the owner of the land lease such tract of land for oil and gas, reserving one-eighth royalty, without stipulating how the one-tenth of all the oil reserved in such prior grant is to be discharged, his lessee will be entitled to deduct the same from the one-eighth royalty oil reserved in the lease.^{17a} A clause in a lease providing for its forfeiture if operations be not begun or a well completed by a designated time, has no application to a failure to pay the royalties provided for in the lease; and a forfeiture of the lease for a failure to pay them cannot be enforced.^{17b} A clause in a lease to the effect if gas be obtained and used, the consideration in full shall be "one-tenth portion of each gas well drilled on the premises described when utilized and sold off the premises, pay-

¹⁵ *Akin v. Marshall Oil Co.*, 188 Pa. St. 602; 41 Atl. Rep. 748.

As to "first net profits" of a coal mine, see *Crocker v. Barteau* 212 Mo. 359; 110 S. W. Rep. 1062.

¹⁶ *Caley v. Portland*, 12 Colo. App. 397; 56 Pac. Rep. 350.

¹⁷ *Busby v. Russell*, 18 Ohio Cir. Ct. Rep. 12; 10 Ohio C. D. 23.

^{17a} *Jackson v. Dulaney*, 67 W. Va. 397; 67 S. E. 795.

Although obtaining royalties be the essence of an oil and gas lease, the time when operations shall commence is the proper subject of the agreement between the parties, and, in the absence of imposition, fraud

or mistake, the provisions of the contract will be upheld. *Ringle v. Quigg*, 74 Kan. 581; 87 Pac. 724.

^{17b} *Davis v. Chautauqua Oil & Gas Co.*, 78 Kan. 97; 96 Pac. 47.

A lessor executed at different times two sets of oil leases to two different lessees, reserving the usual royalty, and, after the first lease had been avoided by the execution of the second the first lessee paid two years' rental or commutation money to the lessor with full knowledge of the execution of the second lease. It was held that such payment did not entitle the lessee to claim the reserved royalty or any

able monthly so long as the gas is to be utilized," means one-tenth of the gas or proceeds of each well when sold.^{17c} An oil lease providing for the payment of one-eighth of the oil produced as royalty, and requiring the lessee to carry the lessor a one-sixteenth working interest clear throughout the lease, means that the lessee shall conduct the operations upon the land without calling upon the lessor to contribute to the funds necessary to produce the oil, and shall pay to the lessor in addition to the royalty one-sixteenth of any profits derived from such operations as though he was the actual owner.^{17d}

§ 257. Payment of operating expenses first.—Free gas.

A lease provided for the payment of a royalty on the gas actually produced, and also contained the following clause: "If gas is obtained in sufficient quantities and utilized off these premises, the consideration shall be the use thereof for domestic purposes and one-eighth of the gas sold for every gas well drilled on the premises herein described and piped off the same." The lease also provided that the lessee should have sufficient gas for the operation of the lease. It was held that the lessor had the right to the gas if it was obtained in sufficient quantities, only after the lessee had used gas for the purpose of operating his lease in a proper and reasonable manner.¹⁸

part of it, either in law or equity. *Eclipse Oil Co. v. Garner*, 53 W. Va. 151; 44 S. E. 131.

^{17c} *Barton v. Laeledge Oil & Mining Co.*, 27 Okl. 416; 112 Pac. 965.

^{17d} *Paxton v. Benedum-Trees Oil Co.* (W. Va.), 92 S. E. 472.

¹⁸ *Fanker v. Anderson*, 173 Pa. St. 86; 34 Atl. Rep. 434. See *Akin v. Marshall Oil Co.*, 188 Pa. St. 602; 41 Atl. Rep. 748.

A gas and oil lease contained a clause that, if gas was found in any well, sufficient to justify saving and casing, lessor may have enough for domestic purposes and the lessee the remainder, and further provided that, if the lessee shall use or sell gas from any well producing gas, it shall pay therefor \$50 per year while the gas shall be sold or used,

except for drilling or domestic use of parties leasing to second parties. It was held that the lessee was liable for stipulated rental if gas is used by it for the purposes other than drilling. *Mathes v. Shaw Oil Co.*, 80 Kan. 181; 101 P. 998.

An oil and gas lease provided as follows: "The party of the first part is to receive the one-eighth (1-8) part of all the oil, gas or other minerals obtained therefrom, to be delivered to the party of the first part in the pipe line upon the premises." This was all printed, except the words "one-eighth" and the fraction "1-8" and the words "in the pipe line," which were written. Further along in the lease was the following, all in writing: "Should gas be found in well or wells sunk

§ 258. Free gas.

A very common provision in oil or gas leases is that the lessor shall have sufficient gas, if any be found, for domestic or a specified use, in addition to pay for the lease or a certain portion of the oil produced. This "free gas" may be regarded as a part of the royalty, as it in fact is. Such a contract is binding upon the lessee. Thus where a contract provided that one of the parties should have sufficient natural gas with which to operate his electric light plant so long as a gas well belonging to the other party would supply it, but allowing such other party to use gas from the well for other purposes, it was held valid; and as the lessor had erected an electric lighting plant at a large expense, which could be operated only with gas, and there was no other gas obtainable or accessible to the plant without great delay and expense, an injunction was issued to prevent the cutting off of the supply.¹⁹ A lease, executed July 25, required the lessees to drill a well within twelve months, or pay the lessor fifty-six dollars yearly as rent. It also provided that the lessee should furnish gas to heat and light the dwelling on the leased premises on or before November 15, of the same year. It was held, notwithstanding these inconsistent provisions, that they were independent and lawful, and

on said demised premises, and should gas be taken off said premises and sold for compensation by said lessees, the said lessee shall pay to the said lessor \$50.00 per annum for a gas pressure of 125 pounds to the square inch, and for each 125 pounds additional pressure, an additional sum of \$50.00 per annum." It was held that the court below committed no error in holding that the quoted clauses of the lease were in conflict, and that the last clause furnished the rule for compensating the lessor for all gas produced from the leased premises. *McArthur v. Tionesta Gas Co.*, 28 Pa. Super Ct. 568.

In an action on an oil and gas lease for rent, it was held error to permit an expert to testify to the

necessity of removing the gas in order to successfully operate the well for the production of oil as showing that the removal of the gas was consistent with the denial of plaintiff's right to collect a rental therefor under a provision in the lease to pay rent should the well produce gas in sufficient quantities to justify marketing it. *Shewalter v. Hamilton Oil Co.*, 28 Ind. App. 312; 62 N. E. Rep. 708.

¹⁹ *Xenia Real Estate Co. v. Macy*, 147 Ind. 568; 47 N. E. Rep. 147. The court cited *Graves v. Key City Gas Co.*, 83 Iowa 714; 50 N. W. Rep. 283, and *Whitman v. Fayette Fuel Gas Co.*, 139 Pa. St. 492; 20 Atl. Rep. 1062, which have been discussed elsewhere.

that the lessee was not excused from liability for a failure to furnish gas within the specified time by their neglect, to drill a well. In this case the lessee assigned the lease. The lessor sold the premises leased in 1896 to the plaintiff, who occupied them for some time thereafter. In 1898 this purchaser executed a deed absolute on its face, but only intended to secure a debt he owed to his grantees. This deed provided that the grantees were "to have the proceeds accruing from said lease." In 1899 these grantees conveyed the leased premises by quit claim deed to one M. at the request of the plaintiff. This quit claim deed was to secure M. for money he had loaned the plaintiff to pay the grantee in the deed of 1898. The plaintiff brought suit for a breach of the agreement in the lease to furnish gas for the dwelling on the leased premises. It was held that the plaintiff who occupied and used the leased land was the only one damaged by a breach of the agreement, and that he could maintain the action, and not the grantees in the deed—the word "proceeds" referring to the rentals stipulated in the lease, and being transferred on a condition never enforced.²⁰ A lease contained a provision requiring the lessee to furnish the lessor gas free for the latter's residence on the premises. It gave the lessee the privilege to remove his machinery and fixtures, but provided if he abandoned the lease while there was a well furnishing gas sufficient for the residence, the well should be left in such a condition as it could be used by the lessor. It was held that the lessee could not remove the pipe from the well, thereby cutting off the supply of gas to the residence, regardless of the fact whether or not such pipe was personal property; and a complaint charging that he did remove the pipe, whereby the gas was wrongfully cut off, stated a good cause of action.²¹ Where a gas company entered into a contract with plaintiff, who was not the owner of the premises leased, to furnish gas for dwelling house purposes so long as a sufficient amount of gas would flow from its well; and a few years thereafter the company gave notice that it would cut off the supply of gas, claiming that the flow was no longer sufficient to supply the plaintiff, it was held he was not entitled to an

²⁰ *Indiana Natural Gas and Oil Co. v. Hinton*, 159 Ind. 395; 64 N. E. Rep. 224.

²¹ *Ohio Oil Co. v. Geiest*, 30 Ind. App. 84; 65 N. E. Rep. 534.

injunction restraining the company cutting off the gas, in the absence of a showing that he had no other means of heating or lighting his dwelling.²² Under a provision that if gas be obtained on the leased premises in sufficient quantities and used off the premises, the lessor shall be entitled to the free use thereof for domestic purposes, the right of the lessor to the use of gas for such purposes is conditioned upon there being a sufficient quantity for that purpose remaining after its use in a reasonable manner by the lessee in the operation of the lease.²³ A right given a lessor to use gas for his mill and three houses is confined to an attachment to a well drilled on his own premises, and he cannot insist that he receive gas from a pipe line conveying gas from other wells beside that upon his own premises, although he was originally permitted to attach to a different pipe line which had been taken up. In this case—a case of a grist mill—the substitution of the roller process instead of the old burr process was held not a violation of the contract for free gas for the mill “as now erected and built,” the change not involving an increase in the consumption of gas.²⁴ If a city or town grant a gas company the exclusive right to the use of its streets, on condition that it furnish it with free gas “so long as they shall have the exclusive right to use the streets and alleys of said city for their pipes,” such company is only compelled to furnish the gas so long as they have the only right granted, and the granting of the privilege to another company giving it the right to lay pipes in the streets for the same purposes as the first grant, relieves the first company from its obligation to furnish free gas. In this case the second contract contained a condition precedent to the effect that such company should have such right if one or more gas wells were in operation within one year; and it was held that the holders of the original franchise were not relieved from furnishing free gas to the city until the condition in the second contract had been performed and the right to occupy the streets with its pipes by

²² *Loy v. Madison, etc., Gas Co.*, 156 Ind. 332; 58 N. E. Rep. 844.

²³ *Fanker v. Anderson*, 173 Pa. St. 86; 34 Atl. Rep. 434.

²⁴ *Pearce v. Bridgewater Gas Co.*, 28 Pittsb. Leg. J. (N. S.) 171.

The lessor is not entitled to free gas when the gas has to be brought from other than the leased premises. *Harbert v. Hope Natural Gas Co.*, 76 W. Va. 207; 84 S. E. 770.

the second company acquired.²⁵ An owner of real estate, in consideration of ten dollars, on April 3, 1889, sold to defendant's assignors all the gas and oil thereunder, with the right to enter the land to drill for oil, the grantees agreeing to drill a well on the premises within twelve months, or pay to the grantor a yearly rental until such well was drilled. Upon failure to pay the rental, the instrument was to be null and void; and the grantor was to have one-eighth of the oil produced and gas from the well or wells for light and heat in the dwellings on the premises free of expense, and the grantees were to furnish the grantor gas in lieu of rental by November 1, 1889. It was held that such contract entitled the grantor to gas for use in his dwelling house in lieu of rental, though no wells were drilled on his premises, and, such gas having been furnished, the grantees were not in default for failure to furnish gas from wells developed on the premises or pay rent.^{25a} If the lease provide that the lessee shall furnish the lessor with free gas, no time being fixed for drilling a well, the well must be drilled in a reasonable time.^{25b} Where the agreement is to furnish gas for a dwelling or pay twenty dollars yearly in advance, the lessor is entitled to the benefit of such stipulation, though no dwelling was maintained on the premises.^{25c}

²⁵ Newark Gas and Fuel Co. v. Newark, 8 Ohio S. and C. P. Dec. 418; 7 Ohio N. P. 76.

An assignee of the lease is bound to comply with the provision in the lease for free gas. Peers v. Consolidated Coal Co., 59 Ill. App. 595; Consolidated Coal Co. v. Peers, 59 Ill. App. 604.

The case of Evans v. Consumers' Gas Trust Co. (Ind.) 29 N. E. Rep. 398; 31 L. R. A. 673, was one containing a question of "free gas," but a rehearing in it was granted, and no second opinion filed.

If a lessor landowner use free gas after forfeiture incurred, he will not waive his right to declare a forfeiture. American Window Glass Co. v. Williams, 30 Ind. App. 685; 66 N. E. Rep. 912.

^{25a} Indiana Natural Gas & Oil Co. v. Lee, 34 Ind. App. 61; 72 N. E. Rep. 283.

^{25b} Indiana Natural Gas & Oil Co. v. Ganiard, 45 Ind. App. 613; 91 N. E. Rep. 362.

^{25c} Indiana Natural Gas & Oil Co. v. Ganiard, *supra*.

The act of the lessee in converting into gasoline to the mutual advantage of both contracting parties, a part of the oil which previously had been wasted by evaporation, was held not to convert oil wells with gas wells so as to render him liable for gas well rentals. Locke v. Russell, 75 W. Va. 602; 84 S. E. 948.

An agreement to furnish "free gas" for a dwelling house does not require the lessee to furnish gas for lights outside of the house. Gillespie v. Iseman, 210 Pa. 1; 59 Atl. Rep. 266.

In an action for damages for failure to furnish gas for domestic purposes according to the terms of a gas lease, a complaint alleging that

§ 259. Royalty in gas or oil used to operate leased premises.

It has been held in the case of a coal mine that upon coal consumed in running an engine to hoist the coal from the mine,

plaintiff had received no gas under the lease, and had been compelled to procure fuel and light from other sources, and that the gas for fuel and lights which should have been furnished under the lease was of the value of \$100, averred sufficient facts for the determination of the measure of damages. *Indiana Natural Gas & Oil Co. v. Lee*, 34 Ind. App. 119; 72 N. E. 492.

The lessee cannot defend on the ground that the lessor has forfeited the lease, where the action is to recover for a failure to furnish gas before the lease was declared forfeited. *Indiana Natural Gas & Oil Co. v. Ganiard*, 45 Ind. App. 613; 91 N. E. Rep. 362.

Use of gas constitutes a waiver of the right to cancel or declare the lease forfeited. *Duntley v. Anderson*, 169 Fed. Rep. 391. But see *Miller v. Vandergrift*, 30 Ohio Cir. Ct. Rep. 730, noted elsewhere in this work.

"Reserve gas enough," in a sale of wells, means "gas enough to supply the plant" referred to in the contract; and the contract will be reformed to that extent. *Carroll v. Erie County, etc., Fuel Co.*, 10 Ont. Wkly. Rep. 1017.

An owner of 200 acres leased the oil and gas under it, with the privilege of removing it within ten years by two wells, in consideration of furnishing gas for use in his dwelling on the premises. Afterwards he sold eighty acres, including the land on which the dwelling stood, and assigned the lease to the purchaser. The purchaser and the lessee agreed that the gas to be supplied under the lease should be supplied for use in another building. It was held that the owner, during the terms of the lease, had no reserved gas or oil rights in any of the land, and a subsequent lease by him to the original lessee before the expiration of the period of the oil and gas under the land retained was inf-

ectual as against the provisions of the outstanding lease, and the purchaser's rights in the land leased, and the purchaser could recover from the lessee damages for breach of the lease, and obtain an injunction restraining threatened acts of the lessee in violation of his rights. *Central Fuel Co. v. Wallace*, 174 Ind. 721; 93 N. E. 65.

A lease provided that the lessor should have "free gas for domestic purposes." The court said that the word "domestic" was a derivative one, expressing some relation to the house or home, and extending to things outside the house as well as within it; its exact meaning in any particular contract depending upon the connection in which it is used. Consequently it was held that the lessor was entitled to maintain only one economic burner for light in the yard at such place as he should designate, where an open burner would be wasteful, though at the date of the lease the use of open burners was customary; he was also entitled to heat and light in his dwelling house. *Hall v. Philadelphia Co.*, 72 W. Va. 573; 78 S. E. 755.

The place of consumption of the gas is to be determined in the absence of an express agreement on that point, from circumstances relating to the subject matter of the contract, known to the parties at the time and from their subsequent conduct. *Harbert v. Hope Natural Gas Co.*, 76 W. Va. 207; 84 S. E. 770.

Under a gas lease providing a graded scale of royalties based on a minimum pressure, but silent as to use of or payment for gas while pressure is below the minimum, the lessor was held not entitled to payment for gas produced below the minimum and marketed by the lessee. *Addleman v. Manufacturers L. & H. Co. (Pa.)*, 100 Atl. 446.

no royalty was due. In that instance the lease provided for a royalty per ton on all coal mined, the ton in all cases to be 2,240 pounds prepared coal; and it was shown that it was the custom at the time of the execution of the lease to hoist prepared coal from the mines by the use of steam power obtained by the incidental consumption of the coal itself.²⁶ But where the lessee agreed to give a portion of all the oil and one-fourth of the profits of all gas "conducted off the premises or sold, it was held that in ascertaining the amount due lessor, all the expenses, including the cost of pipes and materials, payments for right of way and for employees' salaries must first be deducted, and one-fourth of the remainder paid him; and that gas used by the lessee should be charged for at the same rates as if sold to others.²⁷

§ 260. When royalty due,—removal of oil from premises.

The usual lease fixes the time when the royalty shall be paid — as, where it provides for payment of a royalty on all oil produced during the month. In such an event the royalty is due, of course, at the end of that period of time. As a rule little controversy can arise over the point of time when the royalty is payable. If the lease should provide that it was payable on each barrel of oil "mined, taken, or removed from the premises," then the royalty is due when the oil is removed from the well, and its maturity is not postponed until after its shipment.²⁸

²⁶ *Wright v. Warrior Run Coal Co.*, 182 Pa. St. 514; 41 W. N. C. 179; 9 Kulp. 1; 28 Pittsb. L. J. (N. S.) 202; 38 Atl. Rep. 491.

²⁷ *Akin v. Marshall Oil Co.*, 188 Pa. St. 614; 41 Atl. Rep. 748. See also *Meeker v. Browning*, 9 Ohio C. D. 108.

²⁸ *Higgins v. California, etc., Co.*, 109 Cal. 304; 41 Pac. Rep. 1087.

A coal lease provided that the lessee should mine a certain quantity of coal yearly, and pay royalty

in quarterly installments. It was held that the year for which the payments were to be made commenced from the beginning of the actual "mining year," and not from the time at which the lessee had procured his machinery and was ready to proceed with mining operations. *Flynn v. White Breast Coal Co.*, 72 Iowa 738; 32 N. W. Rep. 471.

Lessees of a stone quarry agreed to pay a certain rate for stone

§ 261. **When rent is due for failure to develop land.—Payable in advance.**

Frequently leases require the premises to be developed by a certain time, and if not developed, then the payment of a monthly or yearly rental. In such instances it becomes a question when the rent is payable. In one case a lease required a well to be completed within ninety days, and, "in case of failure so to do, to pay a yearly rental from the expiration of the ninety days until such well shall be completed." It was held that the annual rental was due only at the end of one year after the default, and not from the beginning of the lease.²⁹ Where the lease required the payment of eight dollars per annum from the time of its execution until a fixed date, and thereafter one hundred dollars annually for each gas well after its completion, but until a well was drilled the rent should be eight dollars, there being no clause binding the lessee to drill a well, it was held that the higher rental was not due until the well was completed.³⁰ Under a covenant to commence operations within a year or pay twenty cents per annum "thereafter" until operations were commenced, the lessor, it was held, could not demand pay for the first twelve months after the date of the lease. If the sum to be paid is to be regarded as liquidated damages, or as a penalty, there being no time stated in the lease when it is to be paid, it is due when operations commence, should they commence after twelve months from the date of the lease.^{30a} Whether or not rent because of delay in developing the premises is to be paid in advance or at the end of the

"shipped" by them. It was held that no royalty was due for stone quarried and ready for shipment, but not actually shipped. *Crawford v. Oman, etc., Co.*, 34 S. C. 90; 12 S. E. Rep. 929.

²⁹ *Evans v. Consumers' Gas Trust Co.* (Ind.), 29 N. E. Rep. 398; 31 L. R. A. 673. A rehearing was granted, however, in this case; and after that the appeal dismissed without a second opinion being filed. It is not known on what point the rehearing was granted.

See *Edmonds v. Mounsey*, 15 Ind. App. 399; 44 N. E. Rep. 196, and *Breckenridge v. Parrott*, 15 Ind. App. 411; 44 N. E. Rep. 66.

³⁰ *Diamond Plate Glass Co. v. Tennell*, 22 Ind. App. 346; 52 N. E. Rep. 782.

^{30a} *Dix River Barytes Co. v. Pence* (Ky.), 123 S. W. Rep. 263; *Vendocia Oil & Gas Co. v. Robinson*, 71 Ohio St. 302; 73 N. E. Rep. 222.

period for which it is to be paid is dependent upon the language used in the lease.^{30b} So it has been held that the rent for delay must be paid in advance, although no specific requirement upon this point is inserted in the lease. Thus where a lease contained an express provision for a forfeiture if a well was not completed within sixty days, unless the lessee thereafter paid at the rate of forty dollars per year for each year such completion was delayed, the court considered that the forty dollars per well for each year's delay must be paid in advance, saying: "While the ordinary rule governing rentals is that payment in advance is not required, unless so stipulated in the contract, yet, as the endeavor of the courts in the enforcement of agreements is to effectuate the intent of the makers, we are of the opinion that, in the circumstances of this case, it should be held that it was the purpose of the parties that payment should be made in advance. The situation of the appellant [the lessor] must be considered. There was no express agreement on the part of the operator that he would even explore for gas or oil; on the contrary, he had reserved the right at any time, upon the payment of the nominal consideration of one dollar, to cancel and annul the lease. He had not agreed that he would pay any sum in the nature of rent.^{30c} The contract was not a lease.^{30d} And as the relation of landlord and tenant did not exist, and as there was no beneficial use or occupation, an action could not have been maintained on an implied agreement to pay. The contract before us distinctly contemplated that a forfeiture should result at the end of sixty days (a well not being then completed), unless the operator should pay the consideration for delay. This plainly required him to become an actor if he would save his rights. In such a case the owner has the

^{30b} *Erie Crawford Oil Co. v. Meeks*, 40 Ind. App. 156; 81 N. E. Rep. 518; *Smith v. South Penn. Oil Co.*, 59 W. Va. 204; 53 N. E. Rep. 152; *Consumers' Gas Trust Co. v. Littler*, 162 Ind. 320; 70 N. E. Rep. 363; *Consumers' Gas Trust Co. v. Worth*, 163 Ind. 141; 71 N. E. Rep. 489; *Consumers' Gas Trust Co. v. Howard*, 165 Ind. 170; 71 N. E. Rep. 493; *Jennings-Heywood Oil Syndicate Co. v. Houssiere-Latteille*

Oil Co., 119 La. 793; 44 So. Rep. 481.

^{30c} Citing *Ohio Oil Co. v. Detamore*, 165 Ind. 143; 73 N. E. Rep. 906; *Van Etter v. Kelly*, 66 Ohio St. 605; 64 N. E. Rep. 560.

^{30d} Citing *Hancock v. Diamond Plate Glass Co.*, 162 Ind. 146; 70 N. E. Rep. 149, and *New American Oil Co. v. Troyer*, 166 Ind. 402; 76 N. E. Rep. 353.

privilege of declaring the lease forfeited at the end of said time, except as the other party pays the sum stipulated for delay. The forfeiture must occur, if at all, when that time has elapsed, provided that the owner sees fit to take advantage of it. In those circumstances, it would throw the provisions of said contract into hopeless confusion, and would work great injustice to the owner, to hold that he must wait a year, without even the assurance that the contract would then be complied with, and with no remedy for compensation *de hors* the contract, to have it determined whether the forfeiture he had already elected to declare, acting under the terms of his contract, was really an effective act.^{30e} It will be perceived that this case was made to turn upon the fact that no obligation rested upon the lessee to pay the rent, but he paid at his option. But where the lessee must pay the rent—where a legal obligation rests upon him to pay which can be enforced and the amount collected—then payment in advance cannot be compelled, in the absence of a clause in the lease to that effect.^{30f} A lessor executed at different times two sets of oil leases to two different lessees, reserving the usual royalty, and, after the first lease had been avoided by the execution of the second the first lessor paid two years' rental or commutation money to the lessor with full knowledge of the execution of the second lease, it was held that such payment did not entitle him to claim the reserved royalty or any part of

^{30e} Dill v. Frazee, 169 Ind. 53; 79 N. E. Rep. 971. See also Hayes v. Forest Oil Co., 213 Pa. 556; 62 Atl. Rep. 1072.

^{30f} Gillespie v. Fulton Oil & Gas Co., 236 Ill. 188; 86 N. E. Rep. 219. In this case the lessor repudiated the lease before the year had expired, for which rent was to have been paid by releasing the premises, and the first lessee brought a suit in equity before the year had expired to set aside the second lease, and in his bill tendered performance of all the conditions to be performed by him under his lease; and it was held that this was a sufficient tender

in equity of the rent called for in his lease.

A covenant in a gas and oil lease to drill a well on the leased premises within two years, or to pay \$80 annually until the well is drilled, does not require the payment to be made in advance, and the covenant is performed by a single payment of the entire sum any time before the end of the year. Rhodes v. Mount City Gas, Coal & Oil Co., 80 Kan. 762; 104 Pac. 851.

What is a completion of a well, see Sahl v. Illinois Oil Co., 45 Ind. App. 211; 90 N. E. Rep. 632.

it, either in law of equity.^{30g} Where the lessee, after paying rent promptly for thirteen years, sent his check on the fourteenth year so that it reached the lessor the day after it was due, a forfeiture, it was held, would be unconscionable and was enjoined.^{30h}

§ 262. To whom payable.—Joint lessors.

Royalties or rent is payable, of course, to the lessor or his agent, or to the person designated in the lease as the beneficiary or recipient. On such a proposition as this there can be no dispute. Of course, if the lessor assign or convey the lease, or convey the fee in the leased premises, without reserving the right to the rent or royalty, then it will be payable to his assignee or grantee. And if the lease be granted by two or more joint owners of the premises, and the rent or royalties fixed in it is reserved to them jointly, without a designation of any particular part due any of the lessors, payment to one will be a payment to all, especially so if there be no objection upon the part of the lessors not receiving them.³¹ And if the rent is payable to two lessors, one of whom in fact had no interest in the premises, in an action to recover one-half of the rent brought by the party having no interest in the premises, the lessee may show the circumstances under which such lessor signed the lease, not to deny his landlord's title, but to deny that, as to such alleged lessor, the lease created that relation.³² In such a case the assignment by the owner of his interest in the lease, does not amount to a severance of his interest nor an apportionment

^{30g} *Eclipse Oil Co. v. Garner*, 53 W. Va. 151; 44 S. E. 131.

^{30h} *McKeen Natural Gas Co. v. Wolcott*, 254 Pa. 323; 98 Atl. 955.

For an instance where it was held that delay in the first payments of rent was not found for refusing relief to the holder of an oil lease by way of enjoining operations on a similar lease of the same land and of granting discovery on accounting, the rents not being in arrears when the subsequent lease was given. See *Gulley v. Smith*, 237 U.

S. 101; 35 Sup. Ct. 526; 59 L. Ed. 856; and *Gulley v. Smith*, 237 U. S. 120; 35 Sup. Ct. 532; 59 L. Ed. 866, reversing 202 Fed. 106; 120 C. A. 436.

³¹ *Swint v. McCalmont Oil Co.*, 184 Pa. St. 202; 41 W. N. C. 491; 38 Atl. Rep. 1021; 28 Pittsb. L. J. (N. S.) 319; *Harness v. Eastern Oil Co.*, 49 W. Va. 232; 38 S. E. Rep. 662; *Rymer v. South Penn. Oil Co.*, 54 W. Va. 530; 46 S. E. 459.

³² *Ibid.*

If one of two joint tenants ex-

of the rent, as a matter of law.³³ Where a lease was put upon six hundred acres, divided into three farms, and the lessor dying devised them to his three children; and the lease provided that all its conditions should extend to the lessor's heirs, assigns and personal representatives, it was held that each child was entitled to a share in the royalties, proportioned according as his holdings bore to the six hundred acres, although the wells were all on one farm.³⁴ The grantor of leased premises may be entitled to the royalties, even though he made no reservation in his deed; and the lessee may show this fact when sued by the grantee in the deed of conveyance; and this was held particularly true where a wife and her husband, in a conveyance of her property, at the time of such conveyance, expected that a mortgage of the oil interests would be paid off, and that the

execute a lease for the whole property, the other co-worker may enjoin operations and recover his proportion of the oil and gas produced, without being charged with any cost of development or production. *Ziegler v. Brenneeman*, 237 Ill. 15; 86 N. E. 597.

³³ *Ibid.*

³⁴ *Wettengel v. Gormley*, 184 Pa. St. 354; 39 Atl. Rep. 57. § 920, note 96; § 888; note 21.

When a lease is given in consideration of one-fifth of one-eighth of all the oil produced, and in an order executed by all the interested parties, fixing their relative interests in the oil produced, the lessor agrees to accept one-fifth of one-sixteenth, and directs the delivery to him of that amount as his portion, he will be estopped to claim more than that amount as against the parties to such agreement and those acquiring an interest in the lease subsequently thereto. *Headley v. Hoopengartner*, 60 W. Va. 26; 55 S. E. 744.

In a deed by a guardian conveying the oil and gas in certain lands of his ward's, it was provided that the

lessee should deliver as royalty the proportionate share of one-eighth of all the oil produced and saved from the undivided interests of the infants in the land sold, and, if the purchaser failed to comply in all things with the lease, then from the time of so failing to perform the same all his rights and interests under the decree and sale should be forfeited and revert to the infants. It was held that where, on sale of infants' lands, the purchaser under the terms of the decree and the deed was required to pay to the infants four-fifths of one-eighth of the oil produced, and the guardian signed division orders directing that one-half of that amount be delivered to him as the share of the infants, and that he accepted for several years without demanding the full share, there was no such forfeiture of the lease by the lessees as would cause the property to revert to the infants.

Where an oil lease was given on two tracts of land, and was made to extend to the heirs and assigns of the parties, and different persons

rights would revert to them.³⁵ If the lessee assign the lease, reserving rent to himself, then his portion must be paid to him, while the portion to the lessor must be paid to such lessor.³⁶

§ 263. **Payment of rent to preserve right to mine.—Tender.**

The manner of making payment of the money to be paid for the preservation of the right of the lessee to explore the lands described in the lease does not differ from any other payment of money due; and the same is true of a tender. Not infrequently the lease provides for a payment in a particularly named bank; and when that is the case a deposit of the amount due in the bank, subject to the order of the lessor, is sufficient regardless of the fact that the payment was not made in legal tender. "It was not material," said the court, "whether the deposit was made in lawful money, or in checks or drafts, as it was accepted by the bank, and the amount thereof placed to the credit of appellee [the lessor], subject to his order, thereby enabling him to draw the money from the bank when he desired."^{36a} Depositing the money in the bank as a payment under the provisions of the contract, without any prior notice by appellee [the lessor] to appellant [the lessee] that the former would decline to accept it, was, under the circumstances, in a legal sense, a payment to appellee.^{36b} An aver-

became the owners of the two tracts, each owner was held entitled to the oil produced on his tract, and to the royalty arising from such tract. *Northwestern Ohio Nat. Gas Co. v. Ullery*, 68 Ohio St. 259; 67 N. E. 494.

³⁵ *Simmons v. Buckeye Supply Co.*, 21 Ohio Cir. Ct. Rep. 455; 11 Ohio C. D. 690.

³⁶ *Harris v. Cobb*, 49 W. Va. 350; 38 S. E. Rep. 559.

In a suit to enjoin the lessee in an oil lease executed by husband and wife, and providing for payment of the royalty to their joint credit, from drilling, because the lease, if properly reformed, would

have expired, it was held that the wife was a necessary party. *Colfman v. Hope Natural Gas Co.*, 74 W. Va. 57; 81 S. W. 575.

In case of rival claimants under conflicting oil leases, chancery has jurisdiction to decide who is entitled to the oil and gas, both as to that already produced and that to be produced in future. *Peterson v. Hall*, 57 W. Va. 535; 50 S. E. Rep. 603.

^{36a} Citing *Yoke v. Shay*, 47 W. Va. 40; 34 S. E. Rep. 748; and *Friend v. Mallory*, 52 W. Va. 53; 43 S. E. Rep. 114.

^{36b} *Lafayette Gas Co. v. Kelsay*, 164 Ind. 563; 74 N. E. Rep. 7.

ment in a complaint, in an action to recover rents, that the rent had not been paid includes by implication a statement that it had not been deposited in the bank.^{36c} But an averment that no rental payments had been made since a certain date must be construed to mean that no payments have been made to the plaintiff, and not as negating payments to the original lessor, when he is the plaintiff's grantor of the leased premises.^{36d} Where the lease provides for payment by check or draft, it is no ground for forfeiture that a check sent had printed across its face "payable only through" a named clearing-house, the check being perfectly good.^{36e} If the lessor indicates a purpose not to receive any rent under a lease, he thereby waives any duty resting on the lessee to make a legal tender of it; for a tender to one who announces in advance he will not accept it is unnecessary.^{36f}

§ 264. Damages for failure to deliver lessor his share.

If a lessee fail or refuse to deliver the lessor his share of the oil reserved as royalty he will be liable for the actual market value of the oil at the date of refusal to deliver, with interest from that date.³⁷

§ 265. Interest on royalties.

Interest begins to run on royalties from the date they are due, or if a demand for them is necessary before suit brought, then from the date of the demand. Where a notice of for-

^{36c} *Indiana Natural Gas & Oil Co. v. Lee*, 34 Ind. App. 119; 72 N. E. Rep. 492.

^{36d} *Indiana Natural Gas & Oil Co. v. Lee*, 34 Ind. App. 119; 72 N. E. Rep. 492.

^{36e} *Philadelphia Co. v. Renner*, 222 Pa. 512; 71 Atl. Rep. 1056.

^{36f} *Gillespie v. Fulton Oil & Gas Co.*, 236 Ill. 188; 86 N. E. Rep. 219.

³⁷ *Union Oil Company's Appeal*, 3 Penny. (Pa.) 504. The court refused to apply the rule applicable to stocks in an instance of a refusal to deliver.

feiture was of no effect, for the reason that the demand for unpaid royalties was excessive, it was held that the lessee was only required to pay with interest whatever was due at the time the notice had been given, and the royalties on coal which had been actually mined after the date of the demand and before suit brought, with interest, when a tender had been made.³⁸

§ 266. Waiver.—Parol evidence.

In an action to recover rent or royalties due under a written lease for a year, parol evidence was held admissible to show a written waiver of such rent or royalty.³⁹

§ 267. Surrender.—Tract “retained.”

A lease covered several tracts of land. It provided that in the event any tract failed to yield the lessor a certain royalty, the lessee should pay a certain named rental upon each tract “retained.” It was held that the word “retained” referred to the right to operate, which right continued so long as the lessee had made no formal surrender.⁴⁰ Where the lease required the lessee to complete a well in every period of ninety days from the completion of the first well, if it proved to be a paying one, or surrender the lease, excepting ten acres for each paying well, it was held that the lessee was bound, after the first well proved to be a paying one, either to continue to drill wells, or himself select tracts of ten acres each appurtenant to each well drilled.^{40a} Where an oil lease provided that

³⁸ *West Ridge Coal Co. v. Van Storch*, 5 Lack. Leg. N. 189; 7 Del. Co. Rep. 467.

³⁹ *Crawford v. Bellevue, etc., Gas Co.*, 183 Pa. St. 227; 38 Atl. Rep. 595; *Wilgus v. Whitehead*, 89 Pa. St. 131.

⁴⁰ *Jamestown, etc., Co. v. Egbert*,

152 Pa. St. 53; 25 Atl. Rep. 151; *Jackson v. American Natural Gas Co.*, 31 Pa. Super Ct. Rep. 408.

^{40a} *Monaghan v. Mount*, 36 Ind. App. 188; 74 N. E. Rep. 579; *Pittinger v. Ramage*, 40 Ind. App. 486; 82 N. E. Rep. 478.

To escape liability for rent the

lessee might surrender the lease as to any unproductive well and remove the machinery and be released from further obligation as to such well, failure to formally surrender the lease after the machinery had been removed did not entitle the lessor to further payment of rentals.^{40b}

§ 268. Interdependent conditions.

A lessor was to receive one-eighth of all oil produced under a lease. Subsequently he and the lessee entered into a written supplemental contract in reference to an existing oil well then on the farm, in which it was agreed that if it should produce a daily average of five barrels of oil for thirty days, the lessee should pay the lessor \$250; if ten barrels, \$500; "should the second well provided for in lease in like manner produce fifteen barrels, the lessee to pay the lessor the further sum of \$1,000. Explanations: The understanding and agreement in regard to the test well being that plaintiff is in no event to receive exceeding the sum of \$500." The first well, being old, ceased to produce oil; but the second produced more than fifteen barrels for thirty days. The lessee claimed that the words "in like manner" and "further" showed that the sum to be paid upon the production of the second well was dependent upon the production of the first, and as that had failed, nothing was payable on the second. But the court held that the sums to be paid were in the nature of a bonus, to be paid upon the production of the wells, and that the lessee was bound for the payment on the second well, though the first produced nothing.⁴¹

lessee should surrender, where he has the right, the undeveloped portions of the tract leased. *Steel v. People's Oil & Gas Co.*, 147 Ill. App. 133; *Hutton v. Carnegie Nat. Gas Co.*, 51 Pa. Super Ct. 376.

^{40b} *Diekey v. Coffeyville, etc., Co.*, 87 Kan. 576; 125 Pac. 74.

⁴¹ *Brushwood Developing Co. v. Hickey (Pa.)*, 16 Atl. Rep. 70; 2 Mon. (Pa.) 65.

§ 269. New lease.

If the lessor give the lessee a new lease for the premises, it will amount to a surrender of the old one if the lessee accept it; and will release the lessee from his obligation to pay rental or royalties under the old lease from the date of the surrender, though not from those that had accrued at the time of its acceptance.⁴² In such an event, if the lessee has assigned the lease, but a forfeiture had taken place before the assignment, though not declared until afterward, and the lessor give the lessee a new lease, its acceptance will be a surrender of the old one, depriving the assignee of all rights under it, but releasing him from thence on for the rents and royalties.⁴³

§ 270. Termination of lease by failure to keep its terms.

Although the right to declare a forfeiture of a lease is for the benefit of the lessor, and the lessee cannot avail himself of an actual forfeiture on his part, yet the lease may be so conditioned that a failure to keep the condition, even on the part of the lessee, will terminate its existence and relieve him from any liability, or any further liability, for rents or royalties. In such instances the life of the lease is made to depend upon the performance of the condition imposed. Thus where a grant was made of the oil, gas and minerals underlying a certain tract of land, on the condition that the grantor was to have a certain portion of the product mined; and the deed provided that if no well was completed within a certain period of time from its date, the grant should be null and void, unless the grantee should pay the grantor a specified rental for each year the completion of the well was delayed, and it was also stipulated that the grantee might surrender the lease at any time by paying the rental on the land to the time of the surrender, it was held, in as much as it was optional with the grantee as to whether he would do anything, and as no well had been

⁴² *Smith v. Munhall*, 139 Pa. St. 253; 21 Atl. Rep. 735; *Meeker v. Browning*, 9 Ohio C. D. 108; 17 Ohio C. C. Dec. 548.

⁴³ *Natural Gas Co. v. Philadelphia Co.*, 158 Pa. St. 317; 27 Atl. Rep. 951; *Marks v. Rushville Gas & Oil Co.*, 30 Ohio Cir. Ct. Rep. 798. § 899, note 40.

drilled, there was no obligation resting upon him to pay any rent, or to make compensation for oil or gas.⁴⁴ Where an oil or gas lease was given for a period of twenty years; and if gas was found in sufficient quantities, and was used, there should be paid five hundred dollars per annum for each well drilled; one well was to be completed within six months, and if it was not, then the lessee was to pay a certain sum per annum in full for such yearly delay, until the well was completed; and a failure to complete within that period, or pay such rental, rendered the lease void; and if neither gas nor oil was found on the property within two years from the date of the lease, then the lease was "to expire and be of no effect"; and the lessee permanently ceased to use a gas well drilled on the premises before the expiration of the twenty years for the reason that the gas supply was exhausted, it was held that he was not liable for the annual rent after so ceasing to use the premises.⁴⁵ Where a lease contained no covenant to pay rent or develop the premises, merely providing that it should become

⁴⁴ *Brooks v. Kunkle*, 24 Ind. App. 624; 57 N. E. Rep. 260. See *Snodgrass v. South Penn. Oil Co.*, 47 W. Va. 509; 35 S. E. Rep. 820; *Wilson v. Philadelphia Co.*, 210 Pa. 484; 60 Atl. Rep. 149; *Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co.*, 119 La. 793; 44 So. Rep. 481; *Dill v. Frazee*, 169 Ind. 53; 79 N. E. 971; *Brewster v. Lanyon Zinc Co.*, 140 Fed. Rep. 801; 72 C. C. A. 213; *Briggs v. Elder*, 22 Pa. Super. Ct. Rep. 324.

Though the lessee has the option to drill a well or pay money in lieu thereof, the lessor cannot annul or revoke the lease merely on the ground of a want of mutuality of obligation. *Pyle v. Henderson*, 65 W. Va. 39; 63 S. E. Rep. 762.

⁴⁵ *Williams v. Guffey*, 178 Pa. St. 342; 35 Atl. Rep. 875.

Where an oil lease stipulated that, if no well was completed within 90

days from date, then the grant shall become void unless the lessee shall pay a certain sum for each month thereafter the completion is delayed, unless the lessor waive the condition that the rent shall be paid monthly, on failure of the lessee to pay the rent when it became due, the lease became void, and the lessor was entitled to an injunction to restrain the lessee from operating on the premises. *Meek v. Cooney*, 26 Ohio Cir. Ct. R. 553.

A contract by the terms of which P. granted to B., its successors and assigns, the exclusive right to enter on land at all times for the purpose of drilling and operating for oil and gas, for the term of a year, or so long as gas or oil is found on the premises, B. to drill a well in six months, or in lieu thereof to pay a rental of free gas "till said well is drilled, or the property * * * is

null and void, and all rights cease, unless a well should be completed on the premises within a month, or unless rent be paid in advance at a certain rate per month, it was held that the lessee was under no obligation to continue his explorations, and was under no obligation to pay rent.⁴⁰ The lease or contract does not terminate at the death of the lessor or grantor, though possession has not been taken by the lessee or grantee, and no development work had been undertaken.^{40a} In determining when a lease expires, its date must be excluded in the computation of time.^{40b}

§ 271. Lessee cannot avoid payment by taking advantage of forfeiture clause.—Liability for rent.

It is a trite rule of law that a man cannot take advantage of his own default to avoid liability. Nor can he take advantage of his default in the development of leased property to avoid payment of rent. Where a twenty-year lease provided that if a well was not commenced within three months, the lessee should, after that period, pay a certain monthly rental until the work was commenced; and a clause provided that in no case should the commencement of the well be delayed beyond six months, and if no well was begun within that period, the lease should be forfeited; it was held that the clause of forfeiture was for

reconveyed, * * * or this lease forfeited by its terms," is not terminated, though several years have passed without a well being drilled, and though P. states to B., at a time when P. is still receiving a rental of free gas, that the lease has expired and that he contemplates leasing the property to others, and then disconnects his gas pipes; it being necessary that P. first demand of B. the drilling of a well and give a reasonable time therefor. *Indiana Rolling Mill Co. v. Gas Supply Min. Co.*, 37 Ind. App. 154; 76 N. E. 640.

⁴⁰ *Glasgow v. Chartiers Gas Co.*, 152 Pa. St. 48; 25 Atl. Rep. 232; *contra*, *Chamberlain v. Parker*, 45 N. Y. 569. See *Diamond Plate Glass Co. v. Curless*, 22 Ind. App. 346;

52 N. E. Rep. 782; *Van Etter v. Kelly*, 66 Ohio St. 605; 64 N. E. Rep. 560; *Indianapolis Gas Co. v. Pierce*, 36 Ind. App. 573; 76 N. E. Rep. 173; *Indianapolis Gas Co. v. Rayle*, 36 Ind. App. 706; 76 N. E. Rep. 176; *North American Oil & Gas So. v. Drumm*, 34 Ohio Cir. Ct. Rep. 309.

^{40a} *Indiana Natural Gas & Oil Co. v. Leer*, 34 Ind. App. 61; 72 N. E. Rep. 283.

^{40b} *Eastern Oil Co. v. Coulehan*, 65 W. Va. 531; 64 S. E. Rep. 836.

The rights of the lessee will not be extended by a mere offer to pay the rent, if the lessor elects to treat the lease as terminated. *Armitage v. Mt. Sterling Oil & Gas Co. (Ky.)*, 80 S. W. Rep. 177; 25 Ky. L. Rep. 2262.

the benefit of the lessor, and until he elected to enforce it, the lessee's liability to pay rent continued.⁴⁷ A stronger case arose in the same State. It was provided in a lease, among other things, that if the lessee did not pay rent within ten days after it was due the lease should be void, and neither party, after such failure, should have a right of action by reason of the breach. It was held that the lessee could not relieve himself from liability for the rent, or prevent the lessor from maintaining an action therefor, by making default in its payment.⁴⁸ So where a lease provided that if the lessee failed to complete a well within a month he should, after that time, pay a certain rental, until a well was completed; and that a failure to complete a well or pay the rental should annul the lease, the "lessee having the option to drill said well or not, or pay said rental or not, as he may elect," it was held that he must drill a well or pay the rent, and that he could not avoid the liability by refusing to do either.⁴⁹ But where the lessee was to deliver a part of the oil and pay a certain sum for gas, and the lease was

⁴⁷ *Matthews v. People's, etc., Gas Co.*, 179 Pa. St. 165; 39 W. N. C. 544; 36 Atl. Rep. 216; *Brown v. Vandergrift*, 80 Pa. St. 142; *Hancock v. Diamond Plate Glass Co.*, 162 Ind. 146; 70 N. E. Rep. 149; *Rawlings v. Armel*, 70 Kan. 778; 79 Pac. Rep. 683; *Perry v. Acme Oil Co.*, 44 Ind. App. 207; 88 N. E. Rep. 85, reversing 80 N. E. Rep. 174; *Miller v. Logan*, 31 Pittsb. Leg. J. (N. S.) 217; *New American Oil & M. Co. v. Troyer*, 166 Ind. 402; 77 N. E. Rep. 739 (overruling 76 N. E. Rep. 253). See § 863, note 23.

Where a lease of oil and gas lands required the lessee to drill one well within two years from the date of the lease, and to also drill a second well thereafter unless the first should become useless, and also provided that, in case the wells were not drilled or utilized, then, on payment of the stipulated well

rental, the agreement should continue as though the wells had been drilled, the latter clause, though optional in form, did not permit the lessee to refuse either to drill wells or pay the rent and thus entirely avoid the contract, and on failure to drill, the lessee was liable for the well rental. *Scott v. Lafayette Gas Co.*, 42 Ind. App. 614; 86 N. E. 495.

⁴⁸ *Cogle v. National, etc., Co.*, 165 Pa. St. 561; 30 Atl. Rep. 1038; *Roberts v. Bettman*, 45 W. Va. 143; 30 S. E. Rep. 95.

⁴⁹ *Jackson v. O'Hara*, 183 Pa. St. 233; 38 Atl. Rep. 624; *Wilson v. Philadelphia Co.*, 210 Pa. 484; 60 Atl. Rep. 149.

An oil and gas lease was for a term of nine months, and contained a covenant that it should remain in force "so long as oil is found in paying quantities, providing all

to be null and void unless a well was completed within a year, or unless the lessee paid a certain amount quarterly in advance for each additional three months the completion of well was delayed, it was held that the lease did not bind the lessee to pay any rent for the land or for delay in commencing to bore for oil or gas, as the only consequence that could result from his failure would be a forfeiture of the lease.⁵⁰

§ 272. Forfeiture clauses and liability for rent.

A twenty-year lease required operations to be begun in ninety days, to be prosecuted diligently and continuously, and a well to be completed by a certain date. Failure to do so rendered the lessee liable for an annual sum, payable quarterly in advance. No work was done, but the first quarter was paid voluntarily, and a judgment recovered for the second quarter, which was paid; and an action was brought to recover for the third

conditions are complied with." The consideration was cash. The lessees covenanted to go upon the ground and fully complete one well within nine months from the date of the agreement, and, in case a well is not drilled and completed within nine months, then second parties are to pay the first party \$25 per month until this lease is surrendered, or oil is found in paying quantities." The lessees never entered upon the ground, did nothing under the agreement, and there were no further dealings between the parties relating to the premises. It was held that the lessees could not be compelled to pay \$25 per month after the terms of nine months had expired, and until the written agreement was actually returned to the lessors. *Briggs v. Elder*, 22 Pa. Super. Ct. 324.

⁵⁰ *Snodgrass v. South Penn. Oil Co.*, 47 W. Va. 509; 35 S. E. Rep. 820; *Glasgow v. Chartiers Gas Co.*, 152 Pa. St. 48; 25 Atl. Rep. 232; affirming *Glasgow v. Griffith*, 22

Pittsb. L. J. (N. S.) 181; *Dill v. Frazee*, 169 Ind. 53; 79 N. E. Rep. 971.

Where, in an oil lease, it is stipulated that the lessee shall complete one well within one year or pay \$4 quarterly in advance for each additional three months, such completion is delayed, and it is declared that the contract is made for the sole purpose of operating for oil and gas, and it is manifest that it was not the intention of the parties that the lessee should have a right to hold the land during the term of the lease, but that he should be bound to complete a well within one year, the obligation to pay \$1 quarterly is a mere penal clause, and the making of said payments will be held not to be a fulfillment of the principal contract, in whole or in part, but merely the payment of liquidated damages. *Murray v. Barnhart*, 42 So. 489, 117 La. 1023; *Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co.*, 119 La. 793; 44 So. Rep. 481.

and fourth quarters, to which the lessee set up as a defense the clause in the lease providing that if he failed to perform all the covenants of the lease, such failure to perform, or breach of the covenants, should "work an absolute forfeiture of" the grant. It was held that this was no defense; for the reason that only the lessor could take advantage of the violation of its provisions.⁵¹ And where the clause was that a failure to complete a well within the time and place described should "render the lease null and void, and to remain without any force and effect between the parties," a similar ruling was made.⁵² In another case the lease provided that work should begin within sixty days, and a well be completed within three months after commencing it. If there was a failure to complete a well, the lessee was to pay the lessor for such delay one thousand dollars annually within three months after a well was completed. It was also especially provided that a failure to complete one well or to make such payment within the time specified should render the lease null and void, and to remain without effect between the lessor and lessee. The lessee neither drilled a well nor paid any sum of money. The lessee, when sued for a breach of the covenants of the lease, claimed that his failure to keep them avoided the lease from the beginning, and therefore he was not bound by them; but the court held that no such construction should be given to the lease, and that he could not set up his own default as a defense.⁵³ A like ruling was made where the lease provided that a failure to keep its covenants on the part of the lessee should "render the agreement null and void," and no right of action should after such failure accrue to either party on account of the breach of any promise or agreement "contained in it."⁵⁴ Even where a lease provided it should be void and of no force and effect without the consent of both the lessor and lessee, it was considered that it was for the lessor to

⁵¹ *Wills v. Manufacturing, etc., Co.*, 130 Pa. St. 222; 18 Atl. Rep. 721; 5 L. R. A. 603.

⁵² *Ray v. Western, etc., Co.*, 138 Pa. St. 576; 20 Atl. Rep. 1065; 12 L. R. A. 290; *Cochran v. Pew*, 159 Pa. St. 184; 28 Atl. Rep. 219.

⁵³ *Galey v. Kellerman*, 123 Pa. St. 491; 16 Atl. Rep. 474.

⁵⁴ *Ogden v. Hatry*, 145 Pa. St. 640; 23 Atl. Rep. 334; *Leatherman v. Oliver*, 151 Pa. St. 646; 25 Atl. Rep. 309.

declare a forfeiture and not the lessee, and unless the former did declare one, the latter was bound.⁵⁵

§ 273. Surrender of lease necessary to escape liability for rent.

So long as a lessee holds possession of the leased premises under the lease, he must pay rent, even though the lease provide that in a certain event it was to be null and void. Thus where the term of a coal lease was to end when the workable coal on it was exhausted, but it gave the lessee the use of a part of the demised premises, in connection with mining of coal on adjoining land, the lessee was required to pay the minimum rent provided for in the lease, so long as he retained possession for any purpose under it, although the coal had been exhausted.⁵⁶ And if the lease provide that its surrender should release the lessee from all its covenants and for money due, yet he will not be released by the surrender unless he pay all rents due up to the time he gives up such lease;⁵⁷ for such a provision applies only to future rent, and not to rent due at the time of the surrender.⁵⁸ Where rent was to be paid if no well was completed within the first year, a surrender at the end of the first ten months of the year did not relieve the lessee for the year's rent.⁵⁹ So where the lessee, on pay-

⁵⁵ Phillips v. Vandergrift, 146 Pa. St. 357; 23 Atl. Rep. 347; Jackson v. O'Hara, 183 Pa. St. 233; 38 Atl. Rep. 624.

⁵⁶ Lennox v. Vandalia Coal Co., 66 Mo. App. 560; 158 Mo. 473; 59 S. W. Rep. 242; Roberts v. Bettman, 45 W. Va. 143; 30 S. E. Rep. 95.

⁵⁷ Douthett v. Gibson, 11 Pa. Sup. Ct. Rep. 543; Aderhold v. Oil Well Supply Co., 155 Pa. St. 401; 28 Atl. Rep. 22.

⁵⁸ Edmonds v. Mounsey, 15 Ind.

App. 399; 44 N. E. Rep. 196; Bettman v. Shadle, 22 Ind. App. 542; 53 N. E. Rep. 662; Columbian Oil Co. v. Blake, 13 Ind. App. 680; 42 N. E. Rep. 234; Smiley v. Western, etc., Co., 138 Pa. St. 576; 21 Atl. Rep. 1; Leatherman v. Oliver, 151 Pa. St. 646; 25 Atl. Rep. 309; Ogden v. Hatry, 145 Pa. St. 640; 23 Atl. Rep. 334.

⁵⁹ Breckenridge v. Parrott, 15 Ind. App., 411; 44 N. E. Rep. 66. See § 275.

Whether a surrender can be made

ment of a named sum, may surrender the lease and escape future liability for future rent he cannot escape liability for such rent unless he pays the money and makes a formal surrender of the lease.^{59a}

§ 274. Eviction.

If the lessor convey the leased premises, without any reservation of the lessee's right to enter and drill for oil or gas, his act will be a constructive eviction, which will terminate the lessee's liability for rent.⁶⁰ Eviction by the lessor, of course, terminates the lease.⁶¹ But where the eviction is by another, the usual rules with regard to the rights of landlord and tenant prevail. If there be a covenant for quiet enjoyment, either implied or expressed, and the lessee be evicted by a stranger, he will not be liable for rent, thereafter at least.⁶² Where the

by answer to a complaint to recover royalties due arose in *Bettman v. Shadle*, *supra*, but was not decided. See also *Douthett v. Gibson*, 11 Pa. Sup. Ct. Rep. 543, where a surrender was made after suit brought, but full rent recovered.

A lease that can be surrendered on the payment of a fixed sum of money, at the option of the lessee, and all payments and liabilities subsequently accruing under it be avoided cannot be specifically enforced. *Ulrey v. Keith*, 237 Ill. 284; 86 N. E. Rep. 696.

^{59a} *Scott v. Lafayette Gas Co.*, 42 Ind. App. 614; 86 N. E. Rep. 495. § 897.

In a Kansas case the lease provided for the payment of royalties on oil produced and also for a penalty for failure to operate. It was held that the lessee was liable only for royalties so long as the wells

were operated, and after operation ceased, and until *surrender* of the lease was made he was liable only for the penalty for a failure to operate. *Dickey v. Coffeyville, etc., Co.*, 87 Kans. 576; 125 Pac. 74.

In Oklahoma a lease was held to entitle the lessor to rent until a well was drilled, or the lease was terminated, or cancelled under the surrender clause. *Cohn v. Clark* (Okla.), 150 Pac. 467. In another case rents were held collectible until the lessee reconveyed the lands. *McKee v. Grimm* (Okla.), 157 Pac. 308.

⁶⁰ *Mathews v. People's Natural Gas Co.*, 179 Pa. St. 165; 39 W. N. C. 544; 36 Atl. Rep. 216. What is not an eviction, see *Tiley v. Moyers*, 43 Pa. St. 404.

⁶¹ *Miller v. Michel*, 13 Ind. App. 190; 41 N. E. Rep. 467.

⁶² *Noke's Case*; 4 Rep. 80 b. Cro.

owner of coal land sold the coal underneath it, reserving to himself the right to drill three oil wells on the premises, and then leased the land above the coal for oil purposes; and the lessee, to avoid litigation with the purchasers of the coal, who denied his right to drill the wells, paid them a certain sum, it was held that, though the lease contained words of grant, this did not imply a covenant for quiet enjoyment, since the lease was a mere right to operate, and that the act of the lessee in compromising with the coal owners was no defense to a suit for the amount due under the lease.⁶³ But a lessee cannot suspend the payment of the price of oil because of a danger of eviction, of which he was informed at the time of the purchase.^{63a}

§ 275. Rent to be paid if well not drilled.—Surrender.

It is a very common clause in oil or gas leases that if a well be not dug, or if it be not dug by a certain time, then rent for the tract leased shall be paid, either after a certain time, or from the date of the lease if the well be not dug by a certain date. In one case a lease provided that the lessee should have the right to enter on certain described premises, drill and operate for oil and gas, erect buildings and lay all necessary

Eliz. 674. If the Covenant is only for a quiet enjoyment as against the lessor, see *Line v. Stephenson*, 5 Bing. N. C. 183; 7 L. J. C. P. 263; 7 Scott 69; 1 Arn. 385; *Merrill v. Frame*, 4 Taunt, 329.

⁶³ *Chambers v. Smith*, 183 Pa. St. 122; 38 Atl. Rep. 522. For an eviction the lessee has an action for damages. *Hoosac Mining, etc., Co. v. Donat*, 10 Colo. 529; 16 Pac. Rep. 157.

^{63a} *Jennings-Heywood Oil Syndicate v. Home Oil, etc., Co.*, 113 La. 383; 37 S. E. Rep. 1.

Where there is a clause that it shall be void if a well is not completed, or, in lieu thereof, money paid within a given time, but before expiration of the time it is found that the lessor's title is defective, and he agrees to perfect it, and that the money need not be paid when due, and gives an extension until the title can be perfected, he cannot declare a forfeiture and make a second lease. *Pyle v. Henderson*, 65 W. Va. 39; 63 S. E. 762.

pipes for the production and transportation of them from the premises, reserving a certain portion of the gas and oil, but provided that the lessor leased "one acre anywhere out of the above described tract for a test well, and, if oil or gas is found, then" the lessee "has the balance of the above land to drill at the same royalty as the within lease," upon the condition that if gas only be found the lessor should receive one hundred dollars for "each well;" and the lessee was to commence operations within thirty days from the date of the lease, and failing to do so, to pay the lessor annually five dollars per acre until a well was completed; it was held that the right granted was absolute to take all the gas and oil under the entire tract, and failing to make the test well, five dollars per acre was to be annually paid the lessor.⁶⁴ Where the well was to be dug within six months, and on failure to do so, a rent of five hundred dollars a year was to be paid until the well was completed, but the tenant had the right to protect himself from "further payments or liabilities" accruing under the lease, by a surrender of it, it was held that a surrender made eighteen months after its date did not release the lessee from the five hundred dollars' rent for the previous year.⁶⁵ Where a lease provided for a certain annual rental, payable quarterly, for the product of each well, and reserving a right in the lessee to put an end to the lease by a reconveyance, it was held that the liability for

⁶⁴ *Columbian Oil Co. v. Blake*, 13 Ind. App. 680; 42 N. E. Rep. 234; *Crown Oil Co. v. Probert*, 28 Ohio Cir. Ct. Rep. 739; *Davidson v. Hughes*, 76 Kan. 247; 91 Pac. Rep. 913, 915.

Where a gas lease provides that the rental named should apply only to a well "from which gas is marketed," and that the rent named was "to be paid quarterly while marketed," the lessee is not relieved from paying rental during a summer

quarter because he does not actually deliver gas to customers during that quarter, although he mines it and holds it in reserve in his lines and wells to await the increased consumption in cold weather. *Shrader v. T. W. Phillips Gas & Oil Co.*, 44 Pa. Super Ct. 55.

⁶⁵ § 273. *Aderhold v. Oil Well Supply Co.*, 158 Pa. St. 401; 33 W. N. C. 336; 28 Atl. Rep. 22; *Ramage v. Wilson*, 37 Ind. App. 532; 77 N. E. Rep. 368.

gas used off the premises was not limited to the period of time when gas was actually used, but if gas was used when the year commenced the whole amount for that year then became due and payable, even though the gas was not used for the entire year.⁶⁶ If a lease provide for a periodical rental until a well be completed, or until the expiration of a certain fixed term, the lessee is bound to pay the rental, even though he does not within such term enter on the land and complete a well, unless the lessor prevent him from doing so.⁶⁷ A provision, in instances of the kind given above, that the surrender of the lease shall be a satisfaction of all damages between the lessor and lessee applies only to future rent, and not to rent due at the time of the surrender.⁶⁸ So where the lease contained a provision that it should bind the assignee, and provided that a well should be completed within a year, or, on default the lessee pay "for further delay a yearly rental" until the well was completed, it was held that one becoming the owner of a one-half interest soon after the lease was executed, and shortly after the expiration of the first year becoming, by assignment from the original lessee of the remaining interest, the sole owner of the lease, was liable for the rent due for the second year, the well not having been completed.⁶⁹ A lease provided that the lessee should have the right to drill for gas in three tracts of land out of a one hundred-acre tract, and bound the lessor not to grant any other person the right to drill on this one hundred-acre tract. The lessee agreed to furnish gas for a dwelling house and the lease as long as the lease was in force, to pay one hundred dollars annual rental for each well, pay a like amount a year until a well should be drilled; and to drill one well by a certain date, and pay for it whether drilled or not. Whenever gas ceased to be used generally for manufacturing purposes in the county, the lease was to terminate. It was held that the lessee was bound to drill at least one well, and, failing to do so, he must pay one hundred dollars yearly and supply gas for the dwelling house, for the reason that, during the con-

⁶⁶ *Coulter v. Conemaugh Gas Co.*, 30 Pittsb. L. J. (N. S.) 281.

⁶⁷ *Lawson v. Kirchner*, 50 W. Va. 344; 40 S. E. Rep. 344.

⁶⁸ *Edmonds v. Mounsey*, 15 Ind. App. 399; 44 N. E. Rep. 196.

⁶⁹ *Breckenridge v. Parrott*, 15 Ind. App. 411; 44 N. E. Rep. 66.

tinuance of the lease, the lessor and his grantees or assigns, could not drill or permit any one to drill on the one hundred-acre tract.⁷⁰ So where a well was to be put down by a certain time, or thereafter the lessee must pay the lessor a certain sum annually until a well was completed, it was held that it was no excuse for the lessee that "soon" after the lease was executed it was discovered that the territory was worthless for gas or oil, and for that reason the well was not completed. The lessee was compelled to pay the annual rent.⁷¹ Where a stipulated sum was to be annually paid if there was delay in completing a well, and no date was fixed when the rent should be paid, it was held that it fell due by operation of law at the end of each year.⁷² One dollar was paid the grantors on the execution of a lease; and the grantees agreed to complete three wells within twelve months or pay \$500 as a forfeit. The agreement for payment on default was construed as a provision for liquidated damages, and not a penalty; the amount of damage caused by default being altogether conjectural.^{72a} An oil lease covered 275 acres. It was to continue for ten years and as much longer as oil and gas were produced in paying quantities, with the right to drill upon a fixed royalty. The lease provided that "in case no well is commenced within three months from date, then this grant will immediately become null and void as to both parties," conditioned, however, that the lessee might prevent a forfeiture from quarter to quarter and not longer, by paying a certain sum per quarter "until such well was commenced." It further provided that when "a well was completed the rental should be reduced" a certain amount "per quarter," and the well was to "hold protection of ninety-one acres;" and when a second well should be completed, the rental was to be further reduced to an amount per quarter, and when a third the rental was to cease, and a clause declared," "and it is understood each well

⁷⁰ *Simpson v. Pittsburgh, etc., Co.*, 28 Ind. App. 343; 62 N. E. Rep. 753.

⁷¹ *Springer v. Citizens' Natural Gas Co.*, 145 Pa. St. 430; 22 Atl. Rep. 986.

⁷² *Lynch v. Versailles Gas Co.*, 165 Pa. St. 518; 30 Atl. Rep. 984. See also *Woodland Oil Co. v. Craw-*

ford, 55 Ohio St. 161; 36 Ohio Wkly. L. Bull. 231; 44 N. E. Rep. 1093; 34 L. R. A. 62, where it was held that the sum recoverable was rentals as such, and the lessor was not limited to a recovery of liquidated damages.

^{72a} *Davidson v. Hughes*, 76 Kan. 247; 9 Pac. Rep. 913, 915.

holds for protection one-third of the 275 acres." Two wells were commenced within the required time, but the third well was never drilled. It was held that the completion of the two wells gave the lessee an interest in two-thirds of the entire tract, and that he was bound to pay the amount of the reduced rental per quarter, which the lease provided should be paid on the completion of the second well.^{72b} Where a lease provided that if gas was found, the lessee agreed to pay fifty dollars per year for the product of each well while it was being sold off the premises; and in case no well was completed "in ——— years" from the date of the lease, then the lease was to become null and void, unless the lessee paid in bank for the lessor fifty cents per acre, "payable semi-annually, in advance, \$——— for each year thereafter such completion was delayed," it was held that the lease ran only one year, and no more, unless the acreage rental therein fixed was paid semi-annually in advance.^{72c} But where a lease provided that it should be void if a well were not completed within three months, unless the lessee paid \$500 monthly for each month's delay in completing the well, and each payment was to extend the time for completion for one month, the court ruled that the monthly payment was only a condition precedent necessary to maintain the life of the lease, and that it was not a covenant to pay \$500 per month until the well should be completed or the lease surrendered.^{72d} Where a lease was given for five years, which required the lessee to drill a test well within twelve months, and which provided that if no well was completed within that time, he should pay a rental of a specified sum per acre "to be paid annually counting from the expiration of the said twelve months," it was considered that it did not require the lessee to pay any rent until the expiration of the first year, and at that time, if no test well was completed, the rent commenced to accrue, and, as the lease did not require the rent to be paid in advance, the lessee had all of the second year in which to pay it.^{72e} A lease provided for the

^{72b} Jackson v. American Natural Gas Co., 31 Pa. Super. Ct. Rep. 408.

^{72c} Eric Crawford Oil Co. v. Meeks, 40 Ind. App. 156; 81 N. E. Rep. 518; Dill v. Frazee, 169 Ind. 53; 79 N. E. Rep. 971.

^{72d} Hays v. Forest Oil Co., 213 Pa. 556; 62 Atl. Rep. 1072.

^{72e} Gillespie v. Fulton, 236 Ill. 188; 86 N. E. Rep. 219.

completion of a well by a fixed time, and that it should then become void unless the lessee paid a certain sum quarterly in advance for each three months thereafter the completion was delayed. It was held that if, after having drilled one unproductive well under the lease, and paid commutation money until its completion, he was permitted by the lessor to drill another well, without further payment and without notice that compensation would be demanded for such further use and occupation, none could be recovered.^{72f}

§ 276. Minimum production allowed.

In instances of mining leases there is often a requirement that not less than a certain amount of ore shall be mined and so much royalty per bushel or ton paid annually; and if less than the amount be mined, yet the gross amount of royalty shall be the same as if the requisite amount had been mined; and if more than the requisite amount, then the gross sum of royalties shall be increased by the surplus bushels or tonnage. In an instance of this kind, where the lessor had the power to terminate the lease if the lessee should not be able to find sufficient ore, it was held that until the lease was terminated by the lessor, the lessee continued liable for the least annual sum provided for by the lease.⁷³ Occasionally leases of this character allow the surplus in one year to be applied to the deficiency arising in another, in which event it is not necessary for the deficiency to occur before the excess is produced, and an excess paid for in one year may be applied to the deficiency of a subsequent year.⁷⁴ Where mining works are closed a part of the year, without the lessee's fault, he must pay an amount of the minimum royalty bearing the same proportion to the whole that

^{72f} *Smith v. South*, 59 W. Va. 204; 53 S. E. Rep. 152. The last well, in fact, was not drilled under the lease.

A lessee cannot defend against his liability for rent on the ground that the lessor had declared the lease forfeited. *Indiana Natural Gas & Oil Co. v. Ganiard*, 45 Ind. App. 613; 91 N. E. Rep. 362.

⁷³ *Lehigh Zinc and Iron Co. v. Bamford*, 150 U. S. 665; 14 Sup. Ct. Rep. 219, affirming 33 Fed. Rep. 677. This rental was payable annually, and not postponed to the end of the term.

⁷⁴ *McIntyre v. McIntyre Coal Co.*, 105 N. Y. 264; 11 N. E. Rep. 645.

the part of the year mining operations were carried on bears to the whole year.⁷⁵ In an instance of the kind under discussion, where the lease provided for the payment of a certain sum per month as the minimum amount of royalty, even though no coal were mined, the minimum royalty was regarded as liquidated damages, and not as a penalty.⁷⁶

§ 277. Consideration for lease may be purchase money.

The consideration of a lease or an instrument giving a right to take mineral, oil or gas from the premises, may not be rent at all, but purchase money for the mineral or oil taken out of the earth. Thus where the owner of land sold all the mineral under it, granting to the vendee the right to enter on the premises and dig, explore therein, and occupy them with all necessary structures, and mine and remove all coal, paying to the vendor a certain price per ton of coal removed, payable quarterly, it was held that the stipulated price was purchase money of the real estate, not of the mineral removed, for which the vendor had a lien on the coal not mined and removed, the payment of so much per ton being only a mode of determining the amount of the purchase money to be paid.⁷⁷ So a lease of all the coal in a certain tract of land until it should all be mined and removed, the consideration being the payment of a royalty and also an annual minimum rental, whether coal was mined or not, and providing for a forfeiture, was held to be a sale of the coal and

⁷⁵ *Coaldale, etc., Co. v. Clark*, 43 W. Va. 84; 27 S. E. Rep. 294.

⁷⁶ *Consolidated Coal Co. v. Peers*, 150 Ill. 344; 37 N. E. Rep. 937.

⁷⁷ *Manning v. Frazier*, 96 Ill. 279; *Fairchild v. Fairchild* (Pa.), 9 Atl. Rep. 255; *Duff's Appeal*, 21 W. N. C. (Pa.) 491; *Hatherton v. Bradbourne*, 13 Sim. 599; 13 L. J. Ch. 171; 7 Jur. 1100; *Taylor v. Evans*, 1 H. and N. 101; 25 L. J. Exch. 269; *Foley v. Fletcher*, 3 H. and N. 779; 2 L. J. Exch. 100; 5 Jur. (N.

S.) 342; 7 W. R. 141; 33 L. T. 11; *Hope's Appeal* (Pa.), 3 Atl. Rep. 23; 2 Cent. Rep. 43; 29 W. N. C. 365; *Lazarus' Est.*, 145 Pa. St. 1; 29 W. N. C. 36; *Hancock's Est.*, 7 Kulp. 36; *Kingsley v. Hillside Coal Co.*, 144 Pa. St. 613; 29 W. N. C. 368; 23 Atl. Rep. 253; *Finnegan v. Pennsylvania Trust Co.*, 144 Pa. St. 613; *Delaware, etc., Co. v. Sanderson*, 109 Pa. St. 583; 1 Atl. Rep. 394.

the rental and royalty purchase money; but a failure to pay the rent ended the lease.⁷⁸

§ 278. Consideration for grant part of minerals, creates an exception.

It will readily be observed that when the grantor or lessor reserves a part of the minerals, oil or gas mined or taken out of the earth, such mineral, oil or gas thus reserved cannot be said to be strictly "rent," within the meaning of the definition of that term as applied to letting land generally, for it is not a profit issuing out of the land, but a part of the land itself. It is in fact neither a rent nor a reservation, but an exception. The interest in the part reserved or retained never passes out of the lessor, but remains in him.⁷⁹ Thus a wife, and her husband conveyed real estate in fee simple by deed, reserving by recital to themselves, and did not convey by the deed, the equal one-half part of the usual royalty of one-eighth of all the oil underlying the tract. The grantee then leased the premises, giving the exclusive right to drill and operate for oil and gas, reserving one-eighth of all the oil obtained as produced in the crude state. It was held that the recital in the lease was a reservation to the grantee (or lessor) of one-eighth of the oil which had vested in him, and not of the one-sixteenth which was outstanding in the wife. It was considered that he had not reserved any part of the oil which was considered to be vested in the wife.⁸⁰

§ 279. One well draining two tracts of land.

The owners of two separate tracts made a joint lease of them. The lessee drilled a well only on one tract, but this well drained the other tract. It was held that the owner of the tract on

⁷⁸ *Lehigh, etc., Co. v. Wright*, 177 Pa. St. 387; 35 Atl. Rep. 219; *Lehigh, etc., Co. v. Wilkesbarre, etc.*, Co., 8 Kulp. (Pa.) 540. But see *Barrs v. Lea*, 33 L. J. Ch. 437.

⁷⁹ *Harris v. Cobb*, 49 W. Va. 350; 38 S. E. Rep. 559; *Busbey v. Russell*, 18 Ohio Cir. Ct. Rep. 12; 10 Ohio C. D. 23.

⁸⁰ *Harris v. Cobb*, *supra*.

which the well was drilled was not entitled to a royalty on all the oil produced through the well, on the theory of confusion of goods; but was entitled to an amount equal to the area his land bore to the entire area of the two tracts.⁸¹ Where a lessee took a separate lease for oil on A and B tracts, which adjoined each other, and then, drilling a well on tract A near the line between the two, by agreement of all concerned, he gave notice to the owner of tract B on which he had drilled no well, that if the well drilled on tract A proved to be a paying well, he would put down another one on tract B near the line as an offset; and this was done. It was held that he did not have to account to the owner of tract A for the oil taken from the well on tract B.⁸²

§ 280. Oral change of lease discharging or changing rents.

A written lease, after its execution, may be so modified by parol as to discharge the lessee from all liability to pay rent that was due under it according to its written terms;⁸³ or the amount of the royalty may be reduced by parol. And if the reduction be made in order to induce the lessee to remain in possession, the reduction will be supported by a sufficient consideration to make it binding where it is acted upon and carried out for many years to the acceptance of all concerned, although the lessee might have been liable for damages if he had refused to carry out the original lease.⁸⁴

⁸¹ *Kleppner v. Lemon*, 198 Pa. St. 581; 48 Atl. Rep. 483.

⁸² *Colgan v. Forest Oil Co.*, 194 Pa. St. 234; 75 Am. St. Rep. 695; 30 Pittsb. L. J. (N. S.) 213; 45 Atl. Rep. 119.

Forfeiture of a lease providing that a certain number of wells should be put down on the land so as to affect wells on the adjoining land, and that non-compliance would be ground of forfeiture, may be enforced by a court of equity, though the lessor can obtain compensation in damages. *Powers v. Bridgeport*, 238 Ill. 397; 87 N. E. Rep. 381. See *Brewster v. Lanyon Zinc Co.*, 140 Fed. Rep. 801; 72 C. C. A. 213.

⁸³ *Crawford v. Bellevue, etc., Gas Co.*, 183 Pa. St. 227; 38 Atl. Rep. 595. See *Meeker v. Browning*, 9 Ohio C. D. 108; 17 Ohio C. C. 548.

An agreement to pay rent after a fixed date for each tract of land in which wells are not drilled and operated, is not affected by extension of the time in which drilling might be commenced. *Rawlings v. Armel*, 70 Kan. 778; 79 Pac. Rep. 683.

⁸⁴ *Sargent v. Robertson*, 17 Ind. App. 411; 46 N. E. Rep. 925; *Monroe v. Perkins*, 9 Pick. 298; *Lattimore v. Harsen*, 14 Johns. 330. See *Hunter v. Apollo Oil and Gas Co.*, 204 Pa. 385; 54 Atl. Rep. 274.

§ 281. Failure of oil, royalty ceases.

If the oil is exhausted the royalty ceases, even though the engagement of the lessee is to pay during the term a royalty on so much oil whether produced or not. Thus where an iron mining lease was taken for a term of years, the lessee to mine annually such quantities of ore as would produce a stipulated sum of royalty, and if he did not mine it, pay the royalty any way, and the ore became exhausted before the end of the term—it was held that the obligation to pay royalty ceased with the exhaustion of the ore.⁸⁵

§ 282. Rent for exhausted well.—Flooded well.

So thoroughly embedded in the law pertaining to the production of oil and gas is the idea that all liabilities and rights must turn upon a productive field or lease, that a failure of a gas or oil well may stop the accruing of periodical rent, even where the express language of the lease makes no reference to a cessure of payment in case the well should become exhausted. Thus where the lease was to run twenty years, and for each gas well a rent of five hundred dollars per annum was to be paid; and before the end of the second year the well, without fault of the operators, was flooded with salt water and ceased to produce gas, it was held that the third year's rent could not be collected, for the reason that there should be read into the lease this implied agreement or understanding that the well to be paid for at the stipulated price was not only to be a gas well, but to remain a gas well, and that when it ceased to produce gas it ceased to be a gas well.⁸⁶

⁸⁵ *Hewitt Iron Mining Co. v. Des-sau Co.*, 129 Mich. 590; 89 N. W. Rep. 365. See *Adams v. Stage*, 18 Pa. Super Ct. 308.

⁸⁶ *McConnell v. Lawrence, etc.*, Gas Co., 30 Pittsb. L. J. (N. S.) 346. See also *Williams v. Guffey*, 178 Pa. St. 342; 35 Atl. Rep. 875, and *McKnight v. Manufacturers', etc.*, Gas Co., 146 Pa. St. 185; 23 Atl. Rep. 164; 28 Am. St. Rep. 790.

Where a written agreement granted for a term of years to a gas company all the oil and gas in certain premises together with the right of ingress and egress, and reserved to the grantors the equal one-eighth part of all the oil produced, it was held that if the well in question ceased to be productive (which was a question for the jury to determine) the grantee could dis-

§ 283. Instances of lessee's liability.

A notice of an election on the part of the lessee of his determination to terminate the lease at the beginning of the next ensuing year will not relieve him from the payment of the rent for the current year; and where the lease began from a certain day, to run twenty-one years, on which day the lessee paid a year's rental, and on the same day one year thereafter he gave notice of his intention to terminate the lease, it was held that he was liable for a second year's rent, for upon that day a second year's rent was due and the notice not having been given until then, he was liable for it.⁸⁷ If the lessor neglect to demand rent for the lessee's failure to complete a well by a certain time, that will not defeat its collection thereafter.⁸⁸ Such action is not laches. Where the lessee is to receive so much per well so long as gas is sold off the premises, and the lessee desires to escape on the ground that gas has not been sold off the premises during the period for which the action is brought to recover rent, he must show, and he has the burden to do so, a legal excuse why gas has not been sold, to escape liability.⁸⁹ If the measure of his liability is to pay so long as the wells produce gas, and the flow ceases, he will be relieved from his liability; and if he was to pay an annual rental, and the flow ceased during the year, he will be liable to pay only such a portion of the yearly amount as the time the wells produced bears to the entire year.⁹⁰ A payment of an installment or installments when not liable, will

connect it and relieve itself from liability on account of such well without surrendering the whole grant. It was further held that the mere cessation of the use of gas off the premises was not in itself sufficient to relieve the grantee of the quarterly payments, if as a fact the well continued productive. *Hutton v. Carnegie Natural Gas Co.*, 51 Pa. Super Ct. 376.

Where a well was sunk within the time of the extension, which proved to be a dry well, and then after the lessor's death and after the expiration of the extension the lessee sunk another well, which proved to be

very productive, it was held that the lease had become void and that he was not entitled to the oil. *Zeigler v. Dailey*, 37 Ind. App. 240; 76 N. E. Rep. 819.

⁸⁷ *Nesbit v. Godfrey*, 155 Pa. St. 251; 25 Atl. Rep. 621.

⁸⁸ *Pittsburg Consolidated Coal Co. v. Greenlee*, 164 Pa. St. 549; 30 Atl. Rep. 489.

⁸⁹ *Iams v. Carnegie, etc., Co.*, 194 Pa. St. 72; 45 Atl. Rep. 54. See *Ohio Oil Co. v. Lane*, 59 Ohio St. 307; 52 N. E. Rep. 791, below.

⁹⁰ *Moon v. Pittsburgh, etc., Co.*, 24 Ind. App. 34; 56 N. E. Rep. 108.

not prevent the lessee setting up the invalidity of the lease for installments falling due thereafter.⁹¹ Somewhat at variance with the case given above is an Ohio case. A lease gave the right to operate for oil and gas, and if only gas was found, the lessee should pay a fixed sum per year for each well "while the same is being used off the premises," but contained no stipulation inconsistent therewith; it was held that the lessee was not liable to pay such sum for a gas well whose product was not so used, even though it might be used off the premises without loss to the lessee.⁹² Where the object of the contract was to find phosphate rock of a specified character, it was held that a failure upon a proper endeavor to find the rock was a good defense in an action for royalties.^{92a} Where the owner of land, subject to an exception of one-tenth of all the oil obtained from the land, leases it for oil and gas, reserving a one-eighth royalty without stipulating how the one-tenth reserved is to be discharged, his lessee may deduct the tenth royalty from the eighth royalty reserved in the lease.^{92b}

§ 284. Account rendered.

Where the lessee is to render to the lessor periodical accounts of the amount mined, and he renders such accounts and makes payments based thereon, which are received without objection, such accounts are conclusive on the lessor, in the absence of full and satisfactory evidence of fraud and mistake. They are regarded in the nature of settlements.⁹³

⁹¹ *Diamond Plate Glass Co. v. Tennell*, 22 Ind. App. 132; 52 N. E. Rep. 168.

⁹² *Ohio Oil Co. v. Lane*, 59 Ohio St. 307; 52 N. E. Rep. 791; 40 Wkly. L. Bull. 404; 41 Wkly. L. Bull. 121.

^{92a} *Hiller v. Walter Ray & Co.*, 59 Fla. 285; 52 So. Rep. 623.

^{92b} *Jackson v. Dulaney*, 67 W. Va. 795; 67 S. E. Rep. 795.

⁹³ *Sillingford v. Good*, 95 Pa. St. 25; *Drake v. Lcoe*, 157 Pa. St. 17; 27 Atl. Rep. 538.

The mere cessation to use gas off the premises will not relieve the grantee from quarterly payments if as a fact the well (for which the payment was to be made) continued productive. *Hutton v. Carnegie Natural Gas Co.*, 51 Pa. Sup. Ct. 376.

If the rent is payable in bank in cash, payment by check drawn in favor of lessor and deposited in the bank, will operate as a payment. *Friend v. Mallory*, 52 W. Va. 53; 43 S. E. Rep. 114.

§ 285. How collected.

What kind of an action must be brought to recover rent or royalty due will depend on the circumstances of each particular case. Thus if the amount is dependent on the amount of oil or mineral taken out, a bill in equity will lie to compel an accounting by the lessee.⁹⁴ Where a lease was for the privilege to bore salt wells and manufacture salt, the rent being every twelfth barrel manufactured; and oil rose in the well, which the lessee converted to his own use, claiming a right to all of it, it was held that trover would not lie for the lessor to recover his share, for he had never had possession of any part of it; but his remedy was an action for an accounting.⁹⁵ If periodical payments are to be made of fixed amounts at specified times, then the action must be upon the covenants in the lease when it is under seal, which would be an action of debt or covenant.⁹⁶ If the lease be not under seal, or if the letting be an oral one, then an *assumpsit* lies where the amount is fixed and definite.⁹⁷ An allegation, in a complaint to recover payments under a lease, that such payments were due and payable under its terms is a sufficient allegation that the lease is still in force.⁹⁸ Mere delay in bringing an action if it is not barred by the Statute of Limitations is no defense.⁹⁹ In an action to recover rental

⁹⁴ *Swearingen v. Steers*, 49 W. Va. 312; 38 S. E. Rep. 510; *Bishop of Winchester v. Knight*, 1 P. Wms. 406; *Clavering v. Westley*, 3 P. Wms. 402.

⁹⁵ *Kier v. Peterson*, 41 Pa. St. 357. See *National Transit Co. v. Weston*, 121 Pa. 485; 15 Atl. Rep. 569.

⁹⁶ *Richards v. Killam*, 10 Mass. 239; *Warren v. Ferdinand*, 9 Allen 357; *Codman v. Jenkins*, 14 Mass. 93; *Boston v. Binney*, 11 Pick. 1; *Burnham v. Roberts*, 103 Mass. 379; *Smiley v. McLauthlin*, 138 Mass. 363; *Miller v. Blow*, 68 Ill. 304; *York v. Jones*, 2 N. H. 454.

⁹⁷ *Wills v. Manufacturers', etc., Gas Co.*, 130 Pa. St. 222; 18 Atl. Rep. 721; 5 L. R. A. 602. See

Brown v. Magorty, 156 Mass. 209; 30 N. E. Rep. 1021.

⁹⁸ *Central Trust Co. v. Berwind-White Coal Co.*, 95 Fed. Rep. 391.

A lessor reserving a lien on "all ore mined," for royalties, may recover, in an action of tort, of the lessee who not only fails to pay royalties, but sells the ore without reserving the lien. *Iron Duke Mine v. Braasted*, 112 Mich. 79; 70 N. W. Rep. 414.

⁹⁹ *Ahrns v. Chartiers Valley Gas Co.*, 188 Pa. St. 249; 41 Atl. Rep. 739.

In *Greenough's Appeal*, 9 Pa. St. 18, it was held that distress lay for royalty due from a coal mine. The rent was also considered a preferred claim. See also *Oram's Estate*, 5

for a gas well, if the lease be not between the plaintiff and defendant who is operating under a lease from another person, a non-suit in an action of assumpsit is properly granted.^{99a} In a lessor's action for an accounting of royalties on oil produced all persons whose interests are involved are necessary parties. Such is the case of assignees or those in priority with them holding adversely to the assignee when an adjudication is sought limiting the oil and gas estate to one of several tracts, and an accounting as to all rentals and royalties chargeable to that particular tract.^{99b} In an action for an accounting of royalties, it is competent for the court to order an inspection of the gas

Kulp. (Pa.) 423, and Jones v. Strong, 5 Kulp. (Pa.) 7.

Sufficiency of allegation of transportation of gas off the premises. Pittsburg-Columbia Oil & Gas Co. v. Broyles, 46 Ind. App. 3; 91 N. E. Rep. 754.

^{99a} Titley v. Craig, 222 Pa. 618; 72 Atl. Rep. 233.

Chancery has jurisdiction to decide between *conflicting claims to royalty* under conflicting oil leases to the same lessee both as to that already produced and that to be produced in future by the lessee under the leases, which royalty is to be delivered to the credit of the lessor. Peterson v. Hall, 57 W. Va. 535; 50 S. E. 603.

A complaint to recover rent under an oil and gas lease, alleging that defendant paid all the rents to a certain day, that for certain periods there became due as rents specified sums, and that plaintiff was the owner of the premises, sufficiently alleged that the rent was due and unpaid when the complaint was filed. Scott v. Lafayette Gas Co., 42 Ind. App. 614; 86 N. E. 495. See also Gilbert v. Bolds (Ind. App.), 113 N. E. 379.

A gas and oil lease reserved to the lessor the right to use gas for

domestic purposes in his residence on the premises so long as the lease continued in force, the lessee to pay the lessor, at the latter's option, \$15 per year in lieu of gas. The complaint, in an action for rent, averred that defendant agreed to pay plaintiff \$15 per year in lieu of gas, etc.; that plaintiff was, and since the day of the lease had been, the owner of the premises; that defendant continued to pay during and including the whole of the year 1904; and that the \$15 for the year 1905 was due and unpaid. It was held sufficient on demurrer; the allegations showing that the parties had construed the contract so as to entitle plaintiff to \$15 per year. Scott v. Lafayette Gas Co., 42 N. E. 614; 86 N. E. 495.

Where a married woman who had not joined in the lease her husband had placed on the homestead, who had abandoned her, waited six and a half years before she brought suit for an accounting and to avoid the lease, it was held that she was not bound because of laches, she having delayed the suit to discover her husband. Thompson v. Millikin, 93 Kan. 72; 143 Pac. 430.

^{99b} Gardner v. Smith South Penn. Oil Co. (W. Va.), 86 S. E. 560.

wells, in order to determine their capacity and the rights of the parties.^{99c} If the action is to recover gas taken from the lessor's land through wells on adjoining land, as well as through those on the leased land, it is not necessary to set out the indebtedness in two counts.^{99d} It is optional with the lessor whether he will claim a forfeiture or sue for the rentals; but he is not entitled to both remedies.^{99e}

§ 286. Lien of royalty accruing during receivership.

If royalty accrue from an insolvent mining corporation during a receivership, it will be a first charge on the funds in the hands of the receiver.¹⁰⁰

§ 287. Assignment of lease does not carry oil in tank on premises.

A sale of a lease does not carry the oil pumped out and in the tank on the premises; and parol evidence is not admissible to show that it was intended by a sale of the lease to sell the oil that had been pumped from the well.¹⁰¹

^{99c} Culbertson v. Iola, etc., Co., 87 Kan. 529; 129 Pac. 81.

In this case it was held, as an examination of a long account was involved, that it was proper to send the case to a referee for trial.

^{99d} Culbertson v. Iola, etc., Co., 87 Kan. 529; 125 Pac. 81.

^{99e} Clemenger v. Flecher (Tex. Civ. App.), 185 S. W. 304; McKee v. Grimm (Okl.), 157 Pac. 308; Lamar v. Farmer (Ind. App.), 109 N. E. 791.

There seems to be no reason why he cannot, in an action for a forfeiture, recover for rents past due, but which do not cover the period for which a forfeiture is claimed. See Guffey v. Smith, 237 U. S. 101, 129; 35 Sup. Ct. 526, 532; 59 L. Ed. 856, 866; reversing 120 C. C. A. 436; 202 Fed. 106.

¹⁰⁰ Allison v. Coal Creek, etc., Co. (Tenn.), 3 Pick. 60; 9 S. W. Rep. 226.

That the receiver must pay rent for the use of the fixtures on the lease. See Midland Oil Co. v. Turner, 179 Fed. 74; 102 C. C. A. 368, modifying Turner v. Seep, 167 Fed. Rep. 646, and Seep v. Spade, 179 Fed. Rep. 77.

A lease may give a lien on the mining machinery to secure the payment of royalty. Cherokee Const. Co. v. Bishop, 86 Ark. 489; 112 S. W. Rep. 189.

¹⁰¹ McGuire v. Wright, 18 W. Va. 507. See Dresser v. Transportation Co., 8 W. Va. 553.

As to the "division orders" being a separation of their rights as between partners, see Childers v. Neeley, 47 W. Va. 70; 34 S. E. 825.

CHAPTER VIII.

WHO MAY MAKE A LEASE.

- § 288. Owner of land may grant.
- § 289. Infants.—Lunatics.
- § 290. Married women.
- § 291. Wife joining husband in lease.—Homestead.
- § 292. Administrator or executor.
- § 293. Indian lands.

§ 288. Owner of land may grant.

It is elementary to say that the owner of the fee simple of a tract of land may give a lease to bore for gas or oil upon it. He may do this as readily as he may sell the fee; and to discuss the matter further would be a useless act.^a

§ 289. Infants.—Lunatics.

Gas and oil in land are a part of it, and an infant owning the land has no more power over them than he has over the fee simple of such land. They are minerals, a part of the land. He can no more grant a lease of the land to bore for oil or gas than he can grant a lease of the land for agricultural purposes, or convey the fee simple of it. A lease of the land for gas or oil pur-

^a But a railway company cannot lease its right of way for its development for gas or oil; because it only owns an easement for its road, and not the fee simple. *Consumers' Gas Trust Co. v. American Plate Glass Co.*, 162 Ind. 392; 68 N. E.

Rep. 1020. In this case the landowner, through whose land the railroad ran, was held entitled to an injunction against the lessee of the railroad company who had an oil lease from it of the right of way.

poses must be made by the infant's guardian, as in an instance of a lease of an infant's lands for coal mining.¹ In the case of a lunatic the lease must be executed by his committee.² Usually the court will authorize the execution of a lease, if it be shown that it would be for the benefit of the infant,³ or the lunatic.⁴ Where a statute requires the court to approve a conveyance or lease of a ward's lands by his guardian, a lease for gas or oil must be approved by the court, or it will be void.⁵ Where a will gave seven-tenths of certain real estate to infants, subject to a life estate, giving power to appoint the life-tenant, it was held that the interest of the infants was a vested one; and that any judicial sale under a decree to which they were not parties, except by representation, was void. It was also held that neither the life-tenant nor the owners of the other three-tenths had any right to drill for gas or oil; and the fact that the grantee had expended large sums in developing the premises was not sufficient to estop the infant remaindermen from enjoining the purchaser or his grantee from taking oil or gas from the land. Nor was the fact that they had not made themselves parties to the suit, or that they knew other claimants to the land had been bought off, sufficient to estop them.⁶ Of course an infant's conveyance or lease is voidable, and not void;⁷ and the

¹ Lyddal v. Clavering, Amb. 371, note; Tullit v. Tullit, Amb. 370. Stoughton's Appeal, 88 Pa. St. 198 (oil lease); Chamberlain v. Dow, 16 W. N. C. 532.

² *In re* Smith, L. R. 10 Ch. App. 79; 23 W. R. 297.

³ Camden v. Murrey, 16 Ch. Div. 161; 50 L. J. Ch. 282; 43 L. T. 661; 29 W. R. 190.

⁴ *Ex parte* Grinstone, Amb. 708; Oxenden v. Compton, 2 Ves. 69; *Ex parte* Tabbart, 6 Ves. 428.

⁵ Stoughton's Appeal, *supra*;

Cabin Valley Mining Co. v. Hall (Okl.), 155 Pac. 570. The proper court must approve it. Ozark Oil Co. v. Berryhill (Okl.), 143 Pac. 173.

⁶ Williamson v. Jones, 39 W. Va. 231; 19 S. E. 436; 25 L. R. A. 222; Williamson v. Jones, 43 W. Va. 562; 27 S. E. Rep. 411; 38 L. R. A. 694.

⁷ Engleberth v. Troxell, 40 Neb. 195; 58 N. W. Rep. 852; Cole v. Pennoyer, 14 Ill. 158.

same is true of an insane person not adjudged insane and under guardianship.⁸ But a sale by the guardian, in case of insanity, without the approval of the court, where a statute requires an approval, is void, not voidable; and this is true of a guardian's lease of such land for oil purposes.⁹ A father cannot sell his children's land nor the mineral in it; and if he sell the land, although he give his children other lands in the lieu of those sold, the title of the land still remains vested in them, and they may recover from the purchaser the value of the minerals mined.¹⁰

§ 290. Married women.

A married woman can no more give a lease of her lands for gas, oil or mining purposes without her husband joining her than she can convey such lands without her husband joining in the conveyance. In the case of a deed, the separate deed of the wife is void;¹¹ and to make conveyance of her land valid her husband must join with her in the deed of conveyance; the title

⁸ *Riggan v. Green*, 80 N. C. 236; *Crouse v. Holdman*, 19 Ind. 30.

⁹ *South Penn. Oil Co. v. McIntire*, 44 W. Va. 296; 28 S. E. Rep. 922; *Stoughton's Appeal*, 88 Pa. St. 198.

¹⁰ *Keyes v. Pittsburgh, etc., Co.*, 58 Ohio St. 246; 50 N. E. Rep. 911; 41 L. R. A. 681.

A lease by a guardian of his ward's land, under an approval of the proper court, is valid, even though for so long as oil or gas may be found in paying quantities; and it is binding on the ward after he obtains his majority. *Mallen v. Ruth Oil Co.*, 231 Fed. 845; *Walker v. McKemie*, 44 Okl. 468; 145 Pac. 359; *Duff v. Keeton*, 33 Okl. 92; 124 Pac. 291 (an oil lease is not a

sale of land within the meaning of a statute authorizing a guardian to sell his ward's land).

After executing the lease and its approval by the court, the guardian has no power to change or surrender it except under the approval of the court. *Ardizzone v. Archer* (Okl.), 160 Pac. 446.

Where a ward, after her majority, voluntarily made final settlement with her guardian, receiving the proceeds of an oil and gas lease made by the guardian known by her to be invalid; held, that such settlement was a ratification of the lease. *Lasoy's Oil Co. v. Zulkey*, 40 Okl. 690; 140 P. 160.

¹¹ *Kinnaman v. Pyle*, 44 Ind. 275;

cannot be conveyed by their separate deeds.¹² The deed must conform with the law of the State where the land lies or it will be void.¹³ The same rules apply to a married woman executing a lease on her lands for oil or gas purposes. Thus where all the disabilities of a married woman were canceled by a statute, it being provided that "all the rents, issues, income and profits" of her real estate should "be and remain her own separate property, under her control, the same as if she were unmarried;" but it was also provided that a married woman should have no power to convey or encumber her property without her husband joined her in the deed of conveyance or in the instrument placing an incumbrance on her land, it was held that her contract conveying all the oil or gas on a certain named tract of land, and giving the right to enter on the premises at all times for the purpose of drilling and operating for oil or gas, and to erect and maintain all necessary structures, and lay all pipes necessary for the production and transportation of oil and gas taken from the premises, was void. This lease was void, because the husband of the owner had not joined her in its execution. "While oil and gas," said the court, "remain in the earth within their natural reservoirs or pockets they are parts of the realty itself as much as are stone, coal, lead or iron or any other solid or substantive mineral, and the sale of the real estate carries with it the ownership to all that lies beneath the soil, which, in case it be stone, coal, lead or iron, vests in the purchaser the absolute ownership therein, while, if there is water, oil or gas in or on the land the purchaser's ownership is absolute so long as it remains in or on his land, but when it escapes therefrom

Mettler v. Miller, 129 Ill. 630; 22 N. E. Rep. 529; Central Land Co. v. Laidley, 32 W. Va. 134; 9 S. E. Rep. 61; White v. Wager, 25 N. Y. 328; Winans v. Peebles, 32 N. Y. 423.

¹² Stull v. Harris, 51 Ark. 294; 11 S. W. Rep. 104.

¹³ Glidden v. Strupler, 52 Pa. St. 400; Central Land Co. v. Laidley, *supra*; Leftwich v. Neal, 7 W. Va. 569.

it is lost. In this view of the case, if the appellee could sell the gas or oil which might be found in or under her real estate without her husband joining with her, she could also sell the stone, coal, lead and iron which might be found there, or even the soil itself, thus, if not parting with, in fact destroying, the real estate itself. But if we were to hold the gas and oil found beneath the soil is not a part of the land itself the result in this case must be the same, for under the terms of this contract the appellant had the right to go upon the premises not only to sink gas and oil wells, but also to erect and maintain thereon 'all buildings and structures and lay all pipes necessary for the production and transportation of oil taken from said premises.' These rights are of necessity exclusive in their nature and would vest in the appellant rights in the property or real estate itself, and, if valid, might be enforced to the exclusion of the appellee. The statute especially withholds from married women the right in any manner to encumber or convey away their separate real estate except their husbands join with them." It was further held, that inasmuch as her lease was void, she could not encumber it against her lessee, the lease binding neither the lessor nor the lessee.¹⁴ In that State an ordinary lease of agricultural lands, for the purpose of cultivation, although carrying an interest in land, has been held not to fall within the inhibition of the statute quoted above.¹⁵ And in a case by the Supreme Court of that State, decided after the case was decided by the Appellate Court of the same State from which the quotation above was made,¹⁶ it was held that a married woman could execute, without her husband joining, a lease on her land for the purpose of operating on it a gas or oil well, it not being an encumbrance or conveyance of the land within the meaning of the statute prohibiting a married woman incumbering or conveying her land

¹⁴ *Columbian Oil Co. v. Blake*, 13 Ind. App. 680; 42 N. E. Rep. 234.

This case is reviewed in *Heller v. Dailey*, 28 Ind. App. 555; 63 N. E. Rep. 490.

¹⁵ *Pearcy v. Henley*, 82 Ind. 129; *Nash v. Berkmeir*, 83 Ind. 536. See *Indianapolis v. Kingsbury*, 101 Ind. 200; 51 Am. Rep. 749.

¹⁶ The jurisdiction of the two courts depends, in civil cases, upon the amount involved, and in rare instances an appeal lies from the Appellate to the Supreme Court. The former is bound by the law as declared by the latter, whether there is an appeal from one court to the other or not.

without her husband joining in the execution of the instrument of conveyance or incumbrance. "Leases of the character of the present," said the court, "differ from the ordinary agricultural lease, in that the former may carry a substantial and enduring interest in the freehold, while the latter vests but a transient and temporary interest, that of raising and removing crops. The former, however, in their primary effect, part with no immediate title or estate, and carry but right of exploration, any title or estate which may be contemplated remaining inchoate and of no effect until the oil or gas is found."¹⁷ For the purposes of prospecting, such leases involve a mere use, and part with no greater interest in the freehold than the ordinary agricultural lease. We have here no question of the effect of the instrument of Mrs. Swain to carry a freehold estate, the question being as to the validity of the lease to the appellees in vesting the exclusive right of prospecting or operating for gas and oil. For such purposes we do not doubt the power of Mrs. Swain to lease without her husband joining."¹⁸ It will be observed that the terms of the two leases drawn in question were different; and on this difference the cases may be reconciled. Where husband and wife owned lands as tenants in common, and the lessee, supposing that the husband owned the entire interest in them, took a lease of them, wherein he was to pay a certain rent or complete certain work by a fixed date, or rent where no operations were begun, and none were begun; and after the demand for rent the lessee ascertained that the wife had an interest in the premises, and he then demanded that the wife should join in the lease, to which the lessor assented, but he never secured his wife's signature; and the wife was present during all the negotiations for the lease, but never then or afterwards made objection; it was held that the lessee must pay the full amount of the rent.¹⁹

¹⁷ Citing *Venture Oil Co. v. Fretts*, 152 Pa. St. 451; 25 Atl. Rep. 732.

¹⁸ *Heal v. Niagara Oil Co.*, 150 Ind. 483; 50 N. E. Rep. 482.

¹⁹ *Kunkle v. People's, etc., Gas Co.*, 165 Pa. St. 133; 30 Atl. Rep. 719; 35 W. N. C. 465. See *Simmons v. Buckeye Supply Co.*, 21 Ohio Cir. Ct. Rep. 455; 11 Ohio C. D. 690.

§ 291. Wife joining husband in lease.—Homestead.

A wife should join her husband in a lease of his lands; for upon his death, if she did not join him in its execution, she could assert her marital rights, to the probable injury of an existing lease on the land. So if a lease is made of the homestead, she should join in its execution, not only for the reason given, but for the reason that in those States requiring her consent to the transfer or encumbrance of the homestead to make the transfer or encumbrance valid the same consent is required in granting a lease for mining or oil purposes. Thus a lease of a homestead where such a statute prevails, granting the privilege for gas, oil, and other minerals, at the lessee's pleasure, and to erect all derricks, engine houses, and buildings necessary in mining, excavating mines, and piping oil and gas, is such an alienation as to require the wife's signature, and if she does not sign it, the lease is void.²⁰ They must join in the same instrument, and cannot sign separate instruments so as to bind the land or either of them.²¹ A power of attorney authorizing a sale of the premises must be executed in the same way.²² A gas company, after entering with the express consent of the owners of premises, and expending large sums in laying its pipe line across

²⁰ *Franklin Land Co. v. Wea Gas and Coal Co.*, 43 Kan. 518; 23 Pac. Rep. 630; *Palmer Oil and Gas Co. v. Parish*, 61 Kan. 311; 59 Pac. Rep. 640; *Thompson v. Millikin*, 93 Kan. 72; 143 Pac. 430 (suit by the wife to avoid the lease and for an accounting for oil extracted). See *Pileher v. Atchinson, etc., Ry. Co.*, 38 Kan. 516; 16 Pac. Rep. 945; *Evans v. Grand Rapids, etc., Ry.*, 68 Mich. 602; 36 N. W. Rep. 687; *Bruner v. Hicks*, 230 Ill. 536; 82 N. E. Rep. 888; *Gillespie v. Fulton Oil & Gas Co.*, 140 Ill. App. 147; *Poe v. Ulrey*, 233 Ill. 56; 84 N. E. Rep. 46; *Gillespie v. Fulton Oil & Gas Co.*, 236 Ill. 188; 86 N. E. Rep. 219.

²¹ *Ott v. Sprague*, 27 Kan. 620; *Wallace v. Travelers' Ins. Co.*, 54 Kan. 442; 38 Pac. Rep. 489; *Gage*

v. Wheeler, 129 Ill. 197; 21 N. E. Rep. 1075.

²² *Wallace v. Travelers' Ins. Co.*, *supra*.

As to what will not be an abandonment of a homestead leased for gas, where husband and wife remove from it, because of its undesirability as a residence. See *Palmer Oil and Gas Co. v. Parish*, *supra*.

In Texas, where property was held as community property, and the lessor's husband represented to the defendants he would extend the time, and, on the faith of such representation, the defendants went on to expend moneys and carry out their part of the contract, the lessor was held bound by such waiver. *Presido Mining Co. v. Bullis*, 68 Tex. 581; 4 S. W. Rep. 860.

the same, is entitled to have its property protected by injunction from forcible destruction or injury by the owners, whether the proceedings under which it entered amounted in law to an alienation of the homestead right or not.²³

§ 292. Administrator or executor.

Elsewhere has been discussed the power of an administrator or executor to execute a lease of land for oil or gas;²⁴ and what is there said need not be here repeated. The rule is that neither an administrator nor an executor can lease the lands of the deceased for either oil or gas, unless authorized by will so to do. Thus it has been held that a resident of Ohio, owning a farm in Kansas used only for agricultural purposes, who provided by his will that his executor should take charge of it and lease and maintain it in good condition, with a view to obtaining the best income, could not be leased by them for oil or gas, granting to the lessee all the oil and gas under the premises, and thereby bind the legatees.²⁵

§ 293. Indian lands.

Since oil and gas has been developed in Indian Territory and the State of Oklahoma, considerable litigation has arisen over leases executed by Indians who are the owners of the lands leased, little of which, however, has reached the higher courts. An Act of Congress,²⁶ provides that lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter section, as a homestead, which shall be and remain non-taxable, inalienable, and free from any encumbrance whatever for twenty-one years

²³ *Ralston v. Wichita Natural Gas Co.*, 81 Kan. 86; 105 Pac. Rep. 430.

²⁴ Sec. 60.

²⁵ *Lanyon Zinc Co. v. Freeman*, 68 Kan. 691; 75 Pac. Rep. 995.

²⁶ 32 Stat. at Large, 503, 504.
See Appendix.

from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead in which this condition shall appear. Another section of the same statute provides that "Creek citizens may rent their allotments, for strictly mineral purposes, for a term not to exceed one year, for grazing purposes only and for a period not to exceed five years for agricultural purposes; but without any stipulation or obligation to renew the same. Such leases for a period longer than one year for grazing purposes and for a period longer than five years for agricultural purposes, and leases for mineral purposes may also be made with the approval of the Secretary of the Interior, and not otherwise. Any agreement or lease of any kind or character violative of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity." This agreement was ratified by the Creek Council for July 26, 1902. On April 21, 1904, Congress further provided that "All the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed."²⁷ The Creek Nation is one of the five nations mentioned in this statute. One Zeke Moore, a negro, but a member of the Creek Nation of Indians, by enrollment as a citizen of that tribe, and therefore entitled to an allotment under this Act of Congress, on April 12, 1906, executed to one Litchfield an oil and gas mining lease covering his homestead and also his surplus allotment, being 120 acres. This lease was upon a form provided for use at that time pursuant to the rules and regulations promulgated by the Secretary of the Interior, covering leases of Creek Indian lands, and extended for a period of fifteen years. In consideration of the royalties and other stipulations contained therein, it purported to demise, grant, and let to Litchfield for fifteen years, all of the oil deposits and natural gas in and under this 120 acres, with the right to prospect for them, and other rights usually incident to such leases. The lease thus given was duly approved by the Assistant Secretary of the Interior on January 9, 1907, and immediately thereafter Litchfield began to sink wells on

²⁷ 33 U. S. Stat. at Large, 204. See Appendix.

the portion of the land comprising the homestead, developed a number of paying wells and expended a large sum of money upon the development. After the approval of the lease Litchfield paid Moore \$120, the bonus agreed upon; and thereafter from time to time paid the stipulated royalties. It was held that this was a valid lease.²⁸ Where an oil or gas lease is executed by an Indian in the Indian Territory on a form prescribed by the Interior Department, providing that no sublease or assignment of any interest therein can be made without the consent of the lessor and the Secretary of the Interior, any attempted assignment or transfer without such consent is void. The Secretary of the Interior has no authority to make a lease, or to change or ignore the provisions of one already made and submitted to him for his approval, without the consent of the lessor.²⁹ Where an allottee of Indian lands executed an oil lease thereof wherein it was provided that it should not be assignable without her consent, it was held that a stranger to the lease going upon the land and drilling wells which produced oil, acquired no right by the subsequent assignment to him of the lease without the lessor's consent; and that the assignment was not rendered valid by an approval of the Secretary of the Interior over the lessor's protest. The persons operating the wells were considered to be trespassers and were enjoined from further operating them; and the lease was cancelled.³⁰

²⁸ Moore v. Sawyer, 167 Fed. Rep. 826; see Pickering v. Lomax, 145 U. S. 316; 12 Sup. Ct. Rep. 860; 36 L. Ed. 716. See also Bay v. Oklahoma Southern Gas, etc., Co., 13 Okl. 425; 73 Pac. Rep. 936.

²⁹ Midland Oil Co. v. Turner, 179 Fed. Rep. 74; 102 C. C. A. 368 (modifying decree in Turner v. Seep, 167 Fed. Rep. 646); Seep v. Spade, 179 Fed. Rep. 77.

The Assistant Secretary of the Interior has power to approve an Indian lease under U. S. Rev. Stat. Sec. 439. Turner v. Seep, 167 Fed. Rep. 646.

³⁰ Midland Oil Co. v. Turner, *supra*.

An oil and gas lease is an "alienation of land" within the provisions of section 7 of the Act of March 1, 1901, 31 U. S. Stat. at L. 849, providing that lands shall not be alienable by the allottee or his heirs at any time before five years from the notification of the agreement, except with the approval of the Secretary of the Interior; and, where made of the homestead of a deceased citizen by blood of the Creek Nation, by her heirs, before expiration of the five years, is void. So is an option of purchase contained in such lease. Barnes v. Stonebraker, 28 Okl. 75; 113 Pac. 903.

A tenant of land, allotted to a

member of an Indian tribe, under a lease providing that all improvements made upon the land by the tenant should remain thereupon, and be considered as part consideration for the lease, will be enjoined from removing such improvement at the end of his term, though he first entered into possession of the land under an assignment of the lease which contained such provision, which assignment was void, because not authorized by the proper governmental officers, and placed the improvements upon the land while in possession under the void assignment and under a subsequent valid lease. *Krull v. Rose*, 88 Neb. 651; 130 N. W. Rep. 271.

In this connection we can do no more than make a digest of the decisions relating to leases of Indian oil lands.

An agreement between the lessee in an Indian oil and gas lease and another, made for the purpose of deceiving the Secretary of the Interior and thereby securing his approval of the lease, held one which was contrary to public policy and not specifically enforceable in equity. *Barnsdall v. Owen*, 200 Fed. 519; 118 C. C. A. 623; *Barnsdall v. Del. Indian Oil Co.*, 200 Fed. 522; 118 C. C. A. 626.

Lessees of allotted Indian lands, who have had their day in court at every stage of the proceeding to cancel their lease, are not in a position to complain of the failure of the Secretary of the Interior to give notice of his intention to cancel the lease. *Wade v. Fisher*, 39 App. D. C. 245.

An assignment of royalty due under a mining lease of land allotted to a Quapaw Indian is not an alienation of a part of the land,

in violation of Act. Cong., March 2, 1895, Sec. 1, making such allotments inalienable for 25 years. *Wat-tah-noh-zhe v. Moore*, 36 Okl. 631; 129 Pac. 877.

Where a lessee under an Indian gas lease forfeited the same for failure to drill the well required within 12 months, but did not avail itself of the right to prevent a forfeiture by paying \$1 an acre as authorized by the lease, the United States could not recover such sum in an action on the lessee's bond. *United States v. Comet Oil & Gas Co.*, 202 Fed. 849; 121 C. C. A. 157.

Where the Secretary of the Interior canceled an Indian gas lease November 30, 1909, for the lessee's failure to pay the third year's advanced royalty which was due April 18, 1909, the government was entitled to recover royalty for the entire year. *United States v. Comet Oil & Gas Co.*, 202 Fed. 849; 121 C. C. A. 157.

Allotments to minor Creek Indians were made inalienable by section 4 of the treaty of March 1, 1901, and continued so during infancy until the passage of Act Cong., May 27, 1908. *Texas Co. v. Henry*, 34 Okl. 342; 126 Pac. 224.

Congress had power to authorize the Secretary of the Interior by law to grant a right of way in the nature of an easement for pipe lines over the allotment of a minor Creek Indian, whose allotment contained restrictions against alienation, for the conveyance of oil and gas, on payment of due consideration for the benefit of the allottee. *Texas Co. v. Henry*, 34 Okl. 342; 126 Pac. 224.

Act Cong., March 11, 1904, authorizing the Secretary of Interior

to grant a right of way over allotments of minor Creek Indians for pipe lines, held constitutional. *Texas Co. v. Henry*, 34 Okl. 342; 126 Pac. 224.

Where a minor Indian allottee was awarded \$892.50 under Act Cong., March 11, 1904, for a 20-year easement on 11.9 acres of land for a pipe line, it could not be said that the act was primarily for the benefit of the owner of the easement, and not of the allottee. *Texas Co. v. Henry*, 34 Okl. 342; 126 Pac. 224.

The plenary power of Congress over the tribal relations and lands of the Osage Indians could not be so limited by the act of March 3, 1905, extending a certain approved oil and gas lease, as to preclude Congress by the enactment of June 28, 1906, from providing how and to whom the oil and gas royalties of the allotted lands should be paid. *Leahy v. Indian Territory Illuminating Oil Co.*, 39 Okl. 312; 135 Pac. 416.

The plenary power of Congress over the tribal relations of lands of the Osage Indians could not be so limited by the terms of a certain approved lease extended by act of March 3, 1905, which lease provided for the payment of royalties to the respective allottees instead of to the treasurer of the Osage Nation as to preclude it from afterwards providing that royalties from allotted lands should be paid to the United States Treasury to the credit of the Osage Nation. *Leahy v. Indian Territory Illuminating Oil Co.*, 39 Okl. 312; 135 Pa. 416.

The Foster lease and act of March 3, 1905, extending same in part, gave to the individual members of the Osage Tribe who were subsequently allotted lands under the

act of June 28, 1906, no individual right to the royalties on oil and gas wells located on their respective allotments. *Leahy v. Indian Territory Illuminating Oil Co.*, 39 Okl. 312; 135 Pac. 416.

Under the express provisions of the Osage Allotment Act of June 28, 1906, Sec. 4, par. 2, royalty received from mineral leases upon allotted lands should be paid into the United States Treasury to the credit of members of the tribe as other moneys of that tribe and be distributed to the individual members according to the roll as and when payments of interest on tribal trust funds are made. *Leahy v. Indian Territory Illuminating Oil Co.*, 39 Okl. 312; 135 Pac. 416.

The Osage Allotment Act of June 28, 1906, Sec. 3, reserving minerals to the tribe and authorizing the tribal council to lease same, does not give to the individual allottee the royalties from oil or gas wells on their allotments as mentioned in the Foster lease and act of March 3, 1905, extending same in part, but expressly recognizes the rights of the holders of any valid lease to remain in full force unimpaired by the act or by the allotment. *Leahy v. Indian Territory Illuminating Oil Co.*, 39 Okl. 312; 135 Pac. 416.

An oil and gas lease, executed by the guardian of an Indian minor in Oklahoma and approved by the proper probate court, is valid for its term, although the minor reaches majority before its expiration, and gives the lessee the right of possession, although the land is at the time in possession of another, claiming under a void deed from the minor. *Eteben v. Cheney*, 235 Fed. Rep. 104.

Conferring rights of majority,

conformably to a state statute, on a minor Indian allottee so as to authorize him to make a lease, is beyond the power of an Oklahoma district court, notwithstanding removal of restrictions on alienation by Indian allottees by Act, May 27, 1908, Secs. 1, 4, in view of sections 2 and 6 of the act defining minors. *Truskett v. Closser*, 35 S. Ct. 385; 236 U. S. 223, 50 L. Ed., affirming decree 198 F. 835; 117 C. C. A. 477.

A Seneca Indian, in possession of lands on reservation which had been occupied by him and his Indian predecessors for upwards of 40 years, has no title to the oil and gas in the lands as against the holder of a lease granted in 1910 by the Council of the Seneca Nation and ratified by Act Cong., Feb. 21, 1911, and conveying the exclusive right to operate for oil and gas within the reservation. *Reservation Gas Co. v. Snyder*, 150 N. Y. Supp. 216; 88 Misc. Rep. 209.

Though holding possession under a lease void because not approved by the Secretary of the Interior, as required by Act, June 28, 1906, c. 3572, 34 Stat. 539, a person in actual possession of Osage Indian land was entitled to recover the value of matured hay, destroyed by fire set out by the defendant railroad company in violation of Comp. Laws 1909, Sec. 66. *Midland Valley R. Co. v. Lynn*, 135 Pac. 370.

A suit to enjoin defendants from taking oil and gas without right from lands alleged to be the property of an Indian tribe and to be chiefly valuable for such minerals is cognizable in equity, and may be maintained by the United States. *United States v. Machey*, 214 F. 137, appeal of certain parties dismissed (C. C. A.); *Gladys Belle*

Oil Co. v. Machey, 216 Fed. 129. Decree reversed (C. C. A.) *United States v. Machey*, 216 Fed. 126.

A condition in a lease by an Indian allottee that it should become binding only after approval by the Indian Reservation Superintendent or Secretary of Interior is a condition precedent which calls for the performance of that act before the lease takes effect. *Rogers v. Maloney (Ore.)*, 165 Pac. 357; *Wellsville Oil Co. v. Miller*, 44 Okl. 493; 145 Pac. 344.

Under Act of Congress of June 28, 1898, Sec. 29a, guardian's lease of allotted lands is void unless property recorded within three months after approval by the proper court. *Walker v. McKemie (Okl.)*, 145 Pac. 359. Such a lease is not "executed" until approved by the court. *Ibid.*

Under Act Cong., March 3, 1905, the approval of the Secretary of the Interior was not necessary to the validity of a mortgage of an oil and gas lease in the Osage Nation. *Davis v. Moffett*, 144 Pac. 607, 43 Okl. 771.

Under Act April 26, 1906, sec. 20, Act May 27, 1908, sec. 2, Act March 1, 1907, and rule of Department of Interior, held, that Secretary's approval of Indian oil and gas lease, filed within 30 days, established its priority to subsequent lease previously filed. *Anicker v. Gunsberg*, 226 Fed. 176, 141 C. C. A. 174.

Under the law of Oklahoma, by which an oil and gas lease creates only an incorporeal hereditament, such a lease is not within the champerty laws. *Ethen v. Cheney*, 235 Fed. 104.

Where an oil and gas lease, subject to the approval of the Secretary of the interior, was approved, conditioned on the lessee and its

sureties executing certain documents which they rejected, the conditional approval was a new offer; and not having been accepted there was no contract. *Davis v. Selby Oil & Gas Co.*, 128 P. 1083, 35 Okl. 254.

The duty of canceling a lease of allotted Indian lands, in case of

forfeiture, and of approving another lease, has been imposed by Congress upon the Secretary of the Interior; and his judgment cannot be controlled by injunction in the absence of arbitrary conduct on his part. *Wade v. Fisher*, 39 App. D. C. 245.

CHAPTER IX.

TENANTS FOR YEARS.

§ 294. May work open mines.

§ 295. When may open new mines.

§ 296. Tenant by curtesy.

§ 294. May work open mines.

Unless restricted by the terms of his lease, a tenant for years may work mines opened at the time his lease was granted; but he may not open new mines.¹ And if an owner of land upon which there is a mine opened, make a general lease of it, without any reference to the mine, the lessee has a right to work the mine for he has a lease of all the land, and it is intended that his interest is as general as his lease.²

§ 295. When may open new mines.

But the terms of the lease, though for years, may be such as to exclude the right to mine; or it may be such as to authorize the lessee to open new mines. Thus a demise for agricultural purposes only is such a limitation as to exclude the right of the lessee to take out stones from a quarry on the premises, although open at the time of the lease.³ And where the lease contained the following clause: "To have and to hold the above granted and demised premises, with every privilege, right and appurtenance whatsoever, to the said premises belonging or in any wise appertaining, whether ways, waters, water courses, mines, and

¹ Harlow v. Lake Superior, etc., Co., 36 Mich. 105; Shaw v. Wallace, 25 N. J. L. 455; Kier v. Peterson, 41 Pa. St. 361; Pennsylvania Salt Co. v. Neel, 54 Pa. St. 9; Guffin v. Fellows, 81½ Pa. St. 114.

² Owings v. Emery, 6 Gill. 260.

³ Freer v. Stotenbur, 2 Keyes 467; 2 Abb. Dec. 189; reversing 36 Barb. 641.

minerals of whatever description," it was held that he was entitled to open and work new mines. If there be a lease of land with the mines in it," said the court, "and there be no open mines, the lessee may dig for mines, otherwise the grant as to mines will not take effect."⁴ If the land be leased for coal mining purposes, of course the lessee may open new mines and take out coal.⁵

§ 296. Tenant by curtesy.

Where certain coal lands were unopened at the time of the death of the wife, the tenant by curtesy was held to have no right to open and mine the coal, though, as the coal in place was land, he had a life estate in it, with which estate the remainderman could not interfere; but where such remainderman and tenant by curtesy sold their interest in such land, the proceeds thereof was held to take the place of the land, and the tenant by curtesy was entitled to the whole income during his life.⁶

⁴ Griffin v. Fellows, 81½ Pa. St. 114; contra, Harlow v. Lake Superior, etc., Co., *supra*.

⁵ Heil v. Strong, 44 Pa. St. 264; Gartside v. Outley, 58 Ill. 210;

Franklin Land Co. v. Wea Gas and Coal Co., 43 Kan. 518; 23 Pac. Rep. 630.

⁶ Deffenbaugh v. Hess, 225 Pa. 638; 74 Atl. Rep. 608. See Sec. 264.

CHAPTER X.

TENANCIES FOR LIFE.—DOWER.

- § 297. May work mines or oil wells already open.
- § 298. Rule concerning life tenants applies to oil leases.
- § 299. May not open new mines or bore new wells.
- § 300. Curtesy estate of husband.
- § 301. When mines may be opened or wells bored.
- § 302. Mineral lands unfit for any other purposes than mining.
- § 303. Reversioner or remainderman opening wells.
- § 304. Life-tenant must account for waste.
- § 305. Title to mineral or oil severed.
- § 306. Destruction of *corpus* of the estate.
- § 307. Oil or gas may be exhausted.
- § 308. Estoppel of remainderman.
- § 309. Assignment of dower in mines.
- § 310. Remainderman enjoining extraction of oil or gas.
- § 311. Interest or royalties.

§ 297. May work mines or oil wells already open.

In an instance of coal and the like minerals, a tenant for life may work mines already opened, even to their exhaustion, carrying on the mining skillfully so as not to injure the inheritance; and he may even sink new shafts or wells to the vein already open. This is also true of a widow's dower. She has the right to work mines that were open at her husband's death, which have been assigned to her.¹ And the life tenant may

¹ Lemfer v. Henke, 73 Ill. 405; Priddy v. Griffith, 150 Ill. 560; 37 N. E. Rep. 999; Hendrix v. McBeth, 61 Ind. 473; Elias v. Snowdon State Co., L. R. 4 App. Cas. 454; Moore v. Rollins, 45 Me. 493; Billings v. Taylor, 10 Pick. 460; Kier v. Peterson, 41 Pa. St. 361; Seager v. McCabe, 92 Mich. 186; 52 N. W. Rep. 299; Campbell v. Wardlow, L. R. 8 App. Cas. 641; Reed v. Reed, 16 N. J. Eq. 248; Gaines v. Mining Co., 33 N. J. Eq. 603, reversing 32 N. J.

Eq. 86; Coates v. Cheever, 1 Cow. 460; Rutland v. Gie, 1 Sid. 152; 1 Lev. 107; Neel v. Neel, 19 Pa. St. 323; Brooks v. Hanna, 19 Ohio C. Ct. Rep. 216; 10 Ohio Dec. 480; Irwin v. Covode, 24 Pa. St. 163; Lynn's Appeal, 31 Pa. St. 44; Westmoreland Co.'s Appeal, 85 Pa. St. 344; Eley's Appeal, 103 Pa. St. 300; Sayers v. Hoskinson, 110 Pa. St. 473; 1 Atl. Rep. 308; Fairchild v. Fairchild (Pa.), 9 Atl. Rep. 255; Woodburn's Est., 138 Pa. St. 606;

even penetrate through a seam already open to a new seam lying underneath the one penetrated.² And if the owner of an entire estate lease them for mining operations, and die, his widow is entitled to the royalty of a mine thereafter opened on the portion assigned to her under such lease, it being considered that the mine was practically opened at the owner's death.³ The life tenant may work mines once opened, although they have not been worked for many years before he acquired his life estate; but abandonment of the mine, for a day even, with the intention to devote the land to other purposes, will be fatal to the tenant.⁴ It is immaterial how the life estate has been created.⁵ And if a life estate be given in lands upon which mines are already leased, the life tenant will be entitled to the royalties accruing under the lease.⁶

§ 298. Rule concerning life tenant applies to oil leases.

The rule concerning the right of a life tenant to open new mines or work old ones applies to oil or gas wells upon the life estate.^{6a} Thus where oil wells had been sunk, in the testator's

21 Atl. Rep. 16; *Clift v. Clift*, 3 Pickle (Tenn.) 17; 9 S. W. Rep. 360; *Findlay v. Smith*, 6 Munf. 134; 8 Am. Dec. 733. See *Gannon v. Peterson*, 193 Ill. 372; 62 N. E. Rep. 210.

A widow owning a dower interest has no power to lease the dower premises and thereby bind the remainderman. *Prout v. Hoy Oil Co.*, 263 Ill. 54; 105 N. E. 26.

² *Crouch v. Puryear*, 1 Rand. 258.

³ *Priddy v. Griffith*, 150 Ill. 560; 37 N. E. Rep. 999.

⁴ *Gaines v. Green Pond Iron Mining Co.*, 33 N. J. Eq. 603, reversing 32 N. J. Eq. 86. See *Bogot v. Bogot*, 32 Beav. 509; *Stoughton v. Leigh*, 1 Taunt. 410; *Bartlett v. Phillips*, 4 De G. and J. 414; *Viner v. Vaughan*, 2 Beav. 466.

⁵ *Neel v. Neel*, 19 Pa. St. 323.

⁶ *Shoemaker's Appeal*, 106 Pa. St. 392; *Jones v. Strong*, 5 Kulp. 7.

The rule that the devisee of a life estate is entitled to work a mine already opened does not apply where there is no life estate, but a distribution of income in one proportion, and the *corpus* in another proportion. In such a case the royalty of a coal lease is part of the principal, and is not income. *Brooks v. Hanna*, 19 Ohio C. Ct. Rep. 216; 10 Ohio Dec. 480.

^{6a} *Stewart v. Tennant*, 52 W. Va. 559; 44 S. E. 223; *Eakin v. Hawkins*, 52 W. Va. 124; 43 S. E. 211; *Eakin v. Hawkins*, 48 W. Va. 364; 37 S. E. 622; *Richmond Nat. Gas Co. v. Davenport*, 37 Ind. App. 25; 76 N. E. 525; *Ammons v. Ammons*, 50 W. Va. 390; 40 S. E. 490; *Wilson v. Youst*, 43 W. Va. 563; 28 S. E. 781; *Williamson v. Jones*, 43 W. Va. 563; 27 S. E. 411; 38 L. R. A. 694; 64 Am. St. 891; *Koen v. Bartlett*, 41 W. Va. 559; 23 S. E.

life, under a lease, and one was being sunk when he died, it was held that the life-tenant was entitled to the royalties under the lease.⁷ But if no well has been sunk in the land owner's lifetime, his life-tenant cannot sink an oil well, nor lease the land; and if he do lease it, he cannot recover the rent under the lease.⁸ The life tenant cannot justify his conduct in boring oil or gas wells by claiming that if he did not take out the oil or gas the neighboring landowners will drain the land; for the oil or gas belongs to the remainderman.⁹ Where the owner of land, after leasing it for mining of oil and gas, conveyed it to his children, reserving to himself a life estate in it, it was held that he was entitled to the royalties under the lease.¹⁰ And where a lessee in an oil lease from a life-tenant continues to take oil after the death of the life-tenant, he is liable to the remainderman.^{10a}

§ 299. May not open new mines or bore new wells.

A life-tenant may not open new mines upon the life-estate; for him to do so is waste;¹¹ even though, as in case of oil, it

664; 56 Am. St. 884; 31 L. R. A. 128; *Rupel v. Ohio Oil Co. (Ind.)*, 95 N. E. 225.

⁷ *Woodburn's Estate*, 138 Pa. St. 606; 21 Atl. Rep. 16; *Koen v. Bartlett*, 41 W. Va. 559; 23 S. E. Rep. 664; 56 Am. St. 884; 31 L. R. A. 128; *Richmond Natural Gas Co. v. Davenport*, 37 Ind. App. 25; 76 N. E. Rep. 525; *Priddy v. Griffiths*, 150 Ill. 560; 37 N. E. Rep. 999; 41 Am. St. 397; *Andrews v. Andrews*, 31 Ind. App. 189; 67 N. E. Rep. 461. § 873, note 80.

⁸ *Marshall v. Mellon*, 179 Pa. St. 371; 36 Atl. Rep. 201; 27 Pittsb. L. J. (N. S.) 214; 35 L. R. A. 816; 57 Am. St. Rep. 601; *Gerkins v. Kentucky Salt Co.*, 100 Ky. 734; 39 S. W. Rep. 444; *Gerkins v. Kentucky Salt Co. (Ky.)*, 36 S. W. Rep. 1; *Kenton Gas, etc., Co. v. Dorney*, 17 Ohio Cir. Ct. Rep. 101; 9 Ohio

C. Dec. 694; *Findlay v. Smith*, 6 Munf. 134; 8 Am. Dec. 733 (salt wells). See *Wilson v. Youst*, 43 W. Va. 826; 28 S. E. Rep. 781; *Richmond Natural Gas Co. v. Davenport*, 37 Ind. Rep. 25; 76 N. E. Rep. 525. § 907.

⁹ *Blakeley v. Marshall*, 174 Pa. St. 425; 34 Atl. Rep. 564; 38 W. N. C. 74; *Williamson v. Jones*, 43 W. Va. 562; 27 S. E. Rep. 411; 38 L. R. A. 694; *Childceers v. Neely*, 47 W. Va. 70; 34 S. E. Rep. 828; 49 L. R. A. 468. See also *Bettman v. Harness*, 42 W. Va. 433; 26 S. E. Rep. 271; 36 L. R. A. 566. § 915.

¹⁰ *Koen v. Bartlett*, 41 W. Va. 559; 23 S. E. Rep. 664; 31 L. R. A. 128; 56 Am. St. 884.

^{10a} *Crawford v. Forest Oil Co.*, 208 Pa. 5; 57 Atl. Rep. 47. § 915.

¹¹ *Priddy v. Griffiths*, 150 Ill. 560; 37 N. E. Rep. 999; 41 Am. St. 397;

be necessary to secure it where adjoining landowners have opened wells on their own lands, and the effect is to draw the oil from the land in which the life estate exists.¹² "The fact that possibly, by operations upon neighboring lands, all the gas will be taken before the remainderman came into possession, cannot affect the right of the remainderman to prevent the taking by the lessee or grantee of the life-tenant. That such lessee or grantee will not derive any benefit from a grant or lease which the life-tenant had no right to make cannot be regarded as a hardship to any person."^{12a} If a stranger dig and carry away coal from land in possession of a life-tenant, upon which no mine has been opened, the remainderman must bring the action to recover damages.¹³

§ 300. Curtesy estate of husband.

The right of a husband to royalties in his wife's land by reason of the estate in curtesy he holds, is the same as her dower right in his lands.¹⁴ A tenant by curtesy cannot convey the

Coates v. Cheever, 1 Cow. 460; Whitfield v. Bewit, 2 P. Wms. 240; Clavering v. Clavering, 2 P. Wms. 388; Hook v. Garfield Coal Co., 112 Ia. 210; 83 N. W. Rep. 963; Ohio Oil Co. v. Daughetee, 240 Ill. 361; 88 N. E. Rep. 818.

¹² Blakeley v. Marshall, 174 Pa. St. 425; 34 Atl. Rep. 564; 38 W. N. C. 74; Marshall v. Mellon, 179 Pa. St. 371; 36 Atl. Rep. 201; 35 L. R. A. 816.

^{12a} Richmond Natural Gas Co. v. Davenport, 37 Ind. 25; 76 N. E. Rep. 525; Koen v. Bartlett, 41 W. Va. 559; 23 S. E. 664; 56 Am. St. 884; 31 L. R. A. 128.

¹³ Franklin Coal Co. v. McMillan, 49 Md. 549. Marshall v. Mellon, *supra*.

A testamentary trustee holding land on which there are no oil wells in trust for the benefit of a beneficiary for life with remainder over cannot operate for oil for the benefit

of the life beneficiary, and the taking out of oil is waste which equity will enjoin. Ohio Oil Co. v. Daughetee, 88 N. E. 818, 240 Ill. 361; Williamson v. Jones, 43 W. Va. 562; 27 S. E. 411; 38 L. R. A. 694; 64 Am. St. 891; Richmond Nat. Gas Co. v. Davenport, 37 Ind. App. 25; 76 N. E. 525.

By an instrument in writing the remainderman may authorize a life tenant to execute on oil lease, signed by him as owner of the fee. Prout v. Hoy Oil Co., 263 Ill. 54; 105 N. E. 26.

¹⁴ Alderson v. Alderson, 46 W. Va. 242; 33 S. E. Rep. 228; Stoughton v. Leigh, 1 Taunt. 410; 2 Inst. 299; Sampson v. Grogan, 21 R. L. 174; 42 Atl. Rep. 712; 44 L. R. A. 711.

But see Sec. 260a.

Where there had been a demise of all the coal under the surface of a certain described tract of land, it was held to be a sale of the coal,

right to a lease to extract oil from the land. Such a lease or grant is void.¹⁵

§ 301. When mines may be opened or wells bored.

There are circumstances under which a mine may be opened or a well dug, for the benefit of the life-tenant. These arise by reason of some act of the original owner. Thus where executors, under a power conferred by the will of their testator, executed a coal lease on the testator's land, it was held that the royalties received were income, distributable as such, and not as a part of the *corpus* of the estate. And it was also held that where the chief or sole value of lands is for coal mining, and the only profit to be derived from them is by sale or lease of the coal, which the executors may do, as they see fit, the executor may claim the royalties of a lease they make as income of the estate.¹⁶ The royalties, of course, eventually went to the life-tenants.¹⁷ Where land was valuable only as coal land, and the executors were to collect and give all the income of the estate to the testator's wife, and were given power to sell or lease the lands, as they thought best, it was held that the power to "lease" gave them power to lease the land for mining purposes, although no mine had ever been opened on them; and that the rental arising from such a lease went to the life-tenant as income.¹⁸ Where a testator bequeathed one-half of his residuary estate to his daughter, and directed the rest to be invested for her use during life, giving to his executors power "to sell and convert my estate into money, or to lease my coal interest," and to invest the proceeds of the coal lands so as to produce a permanent revenue, the income from which was to be paid to the daughter; and after making his will he leased the land, receiving a royalty for

and the amounts due from the lessee to the lessor as royalties were not rents, but the purchase money of real estate. Such royalty was held to be collectible by the legal representatives of the deceased owner as personal property, was not profits of the real estate, and was not the subject of curtesy. *Fairchild v. Fairchild* (Pa.), 9 Atl. Rep. 255.

¹⁵ *Barnsdall v. Boley*, 119 Fed. Rep. 191.

¹⁶ *Reynolds v. Hanna*, 55 Fed. Rep. 783. See *Rankin's Appeal*, 1 Mong. 308 (Pa.), 2 L. R. A. 429.

¹⁷ *Eley's Appeal*, 103 Pa. St. 300 (a like case): *McClintock v. Dana*, 106 Pa. St. 386; *Shoemaker's Appeal*, 106 Pa. St. 392.

¹⁸ *Wentz's Appeal*, 106 Pa. St. 301.

the lease, it was held as this royalty was a part of the residuary estate one-half of it went to the daughter, and the other half must be invested for her use.¹⁹ So where husband and wife conveyed unopened coal lands to trustees, with power to "control, lease, demise, and to mine-let" such lands, and to collect and pay over to the wife the income from the same, with remainder over, it was held that at his death the trustees could grant a lease of the lands, and the income from the lease was payable to the wife.²⁰ So where the owner of land having on it a salt well provided by his will as follows: "During the life of my wife it is my intention and request that A, B and her do carry on my business in partnership, both salt works and merchandising, equal shares; and that in consideration of the use of my capital they pay out" certain named legacies, it was held that the life-tenants might sink new salt wells, even to the exhaustion of the salt veins; and that they had the right of wood, from the testator's wood land in an unlimited amount, to carry on the works which he had used for that purpose in his lifetime.²¹

§ 302. Mineral lands unfit for any other purposes than mining.

The rule that a life-tenant may not open a mine and work it upon the life estate, has been denied in cases where the lands were only fit for mining purposes.²² And it has been held that the rule not permitting a life-tenant to open new mines has no application to this country.²³

¹⁹ Jones v. Strong, 5 Kulp. 7.

²⁰ Bedford's Appeal, 126 Pa. St. 117; 17 Atl. Rep. 538.

²¹ Findlay v. Smith, 6 Munf. 134; 8 Am. Dec. 733.

²² Wentz's Appeal, 106 Pa. St. 301; Reynolds v. Hanna, 55 Fed. Rep. 783.

²³ Seager v. McCabe, 92 Mich. 186; 52 N. W. Rep. 299; 16 L. R. A. 247. This was a statutory life es-

tate. See St. Paul Trust Co. v. Mintzer, 65 Minn. 124; 67 N. W. Rep. 657; 32 L. R. A. 756; Wilkinson v. Wilkinson, 59 Wis. 557; 18 N. W. Rep. 528; Melms v. Pabst Brewing Co., 104 Wis. 7; 79 N. W. Rep. 738, and Disher v. Disher, 45 Neb. 100; 63 N. W. Rep. 368, which are other instances of statutory life estates, but not cases involving mines.

§ 303. Reversioner or remainderman opening wells.

The right of possession of land is in the life-tenant. The reversioner or remainderman has no right of possession as long as the life tenancy is in existence. He, therefore, has no right, without the consent of the life-tenant, to enter on the premises to sink oil or gas wells; and if he do, without such consent, the product of the wells will belong to the life-tenant, who may thereafter work them. By the severance of the oil or gas from the soil they become profits arising from the land; and as all profits belong to the life-tenant, he is entitled to take such oil or gas.²⁴

§ 304. Life-tenant must account for waste.(a)

Inasmuch as the opening of mines or boring of oil and gas wells, and taking their product by the life-tenant from the soil is a waste, such tenant must account to the remaindermen, not on the basis of an annual rental, but on the basis of rents and profits. And if there be several of the remaindermen, each is entitled to his share. And if the tenant for life is one of three tenants in the remainder, and he ousts his co-tenants in such remainder, claiming the entire title, he, having notice of their title, is not entitled to compensation for improvements he has made upon the land, under a statute allowing compensation to those who make improvements on land, under the belief that they have a good title. In such an instance when the remaindermen call for an accounting they must allow the life-tenant all the costs of production, which includes the cost of boring the well.²⁵ In an action by a remainderman for his share of the profits of mining operations under a lease by the life tenant, the measure of damages must depend largely upon the peculiar circumstances, but compensation is the used rule, and as between tenants in common, such compensation may be figured by the

²⁴ *Koen v. Bartlett*, 41 W. Va. 559; 23 S. E. Rep. 664; 31 L. R. A. 128; *Rupel v. Ohio Oil Co. (Ind.)*, 95 N. E. 225.

(a) § 880.

²⁵ *Williamson v. Jones*, 43 W. Va. 562; 27 S. E. Rep. 411; 38 L. R. A. 694; 64 Am. St. 891. See *Williams*

v. Bolton, 3 P. Wms. 268; 1 Cox Ch. Cas. 72; *Foster v. Weaver*, 118 Pa. St. 42; 12 Atl. Rep. 313; *Ward v. Ward*, 40 W. Va. 611; 21 S. E. Rep. 746; 29 L. R. A. 449; *Effinger v. Hall*, 81 Va. 94. § 873, note 81, 82.

fair market value of the minerals in place, on the basis of royalty to be obtained for the privilege of removing the mineral in view of all the circumstances.

If the life tenant leases the right to mine oil and gas, and the leasing is ratified by one of two remaindermen, the lease is in effect a sale, and an action by the other remainderman for his share of the profit of the mining operations must be regarded as based on a development of the land by a tenant in common; and a claimant of a co-tenant for his share of the proceeds, and in such a case the fact that the operations were carried on by third parties under a lease will not make the defendants trespassers, nor cause them to be regarded other than as co-tenants.^{25b}

§ 305. Title to mineral or oil severed.

If the life-tenant open mines or bore oil or gas wells without right, the mineral, oil or gas taken out will belong to the remaindermen, the title thereto being in him.²⁶ By the severance they become personal property; and the remaindermen may replevin them from whomever may come into possession of them.²⁷

§ 306. Destruction of corpus of the estate.

The life-tenant has no right to destroy the *corpus* of the estate. Such is the case, as we have seen, where he opens new mines or bores new oil or gas wells; and what he may not do directly, he cannot do indirectly, as by giving the right to others by the way of lease or otherwise. And if he give a lease on undeveloped territory, he cannot collect the rent or royalty; for that belongs to the reversioner or remaindermen.²⁸ If the lessor

^{25b} McIntosh v. Ropp, 233 Pa. 497; 82 Atl. 949.

²⁶ Williamson v. Jones, 43 W. Va. 562; 27 S. E. Rep. 411; 38 L. R. A. 694; 64 Am. St. 891.

²⁷ Omaha, etc., Co. v. Tabor, 13 Colo. 41; 21 Pac. Rep. 925; Hughes v. United Pipe Lines, 119 N. Y. 423; 23 N. E. Rep. 1042.

²⁸ Marshall v. Mellon, 179 Pa. St.

371; 27 Pittsb. L. J. (N. S.) 214; 36 Atl. Rep. 201; 57 Am. St. Rep. 601; 36 L. R. A. 816; Gerkins v. Kentucky Salt Co., 100 Ky. 734; 39 S. W. Rep. 444; Gerkins v. Kentucky Salt Co., 36 S. W. Rep. 1; Kenton Gas, etc., Co. v. Dorney, 17 Ohio Cir. Ct. Rep. 101; 9 Ohio C. Dec. 604; Woodburn's Est., 138 Pa. St. 606; 21 Atl. Rep. 16; Koen v.

sell the leased premises, making no reservation of the oil royalties, the purchaser is entitled to them.^{28a}

§ 307. Oil or gas may be exhausted.

No limitation can be placed upon the right of a life-tenant to use gas or oil wells, or mines, already bored or open; and the same is true if he had the right to bore wells or open mines. He may exhaust the oil or gas in the entire tract of land subject to the life estate, or all the ore that can be found in the mine; and the reversioner or remainderman cannot complain, although thereby the land may be rendered practically worthless.²⁹ Nor is the life-tenant confined to the exact method pursued by the original grantor. Thus if such original owner used the gas or oil for his own use only, that does not prevent the life-tenant selling the gas or oil he pumps out.³⁰

§ 308. Estoppel of remainderman.

In rare instances a remainderman may be estopped in an attempt to restrain the taking of ore, gas or oil from the land in which he has a remainder. An instance arose in Kentucky, where the life-tenant gave a lease to bore for oil and gas upon land not theretofore developed. The lessee under this lease drilled a well at great expense, with the knowledge of some of the remaindermen, who would not be benefited by having the well closed. It was held that the lessee was entitled to be compensated for his improvements, that he might continue to work under the lease, but must pay the remaindermen a fair royalty for all salt water he took out after they had brought their action to restrain him.³¹

Bartlett, 41 W. Va. 559; 23 S. E. Rep. 664; 31 L. R. A. 128; Blakeley v. Marshall, 174 Pa. St. 425; 34 Atl. Rep. 564; 38 W. N. C. 74; Williamson v. Jones, 43 W. Va. 562; 27 S. W. Rep. 411; 38 L. R. A. 694; 64 Am. St. 891; Childers v. Neely, 47 W. Va. 70; 34 S. E. Rep. 828; 49 L. R. A. 468.

^{28a} Osborn v. Arkansas, etc., Oil & Gas Co., 103 Ark. 175; 146 S. W. 122.

²⁹ Koen v. Bartlett, 41 W. Va. 559; 23 S. E. Rep. 664; 31 L. R. A. 128; Shoemaker's Appeal, 106 Pa. St. 392; Sayers v. Hoskinson, 110 Pa. St. 473; 1 Atl. Rep. 308; Rankin's Appeal, 1 Monaghan (Pa.) 308; 2 L. R. A. 429.

³⁰ Neel v. Neel, 19 Pa. St. 323; Irwin v. Covode, 24 Pa. St. 162; Holman's Appeal, 24 Pa. St. 174.

³¹ Gerkins v. Kentucky Salt Co., 100 Ky. 734; 39 S. W. Rep. 444;

§ 309. Assignment of dower in mines.

In assigning dower there should be taken into consideration the value of the mines so far as opened during the husband's life, and the admeasures may, in their discretion, assign the dower in lands by metes and bounds containing the mines or not, by directing a separate alternate enjoyment of the whole for periods proportioned to the share of the parties, or by giving the widow a part of the profits. But there can be no account taken of the mines opened since the death of the husband by his alienee, nor of the improvements made therein by such alienee.³² "It is not necessary," says a standard English authority, "that the widow should have a third or other proportion of each part of the estate; and if, therefore, the husband be possessed of divers mines, the sheriff may assign such a number of them as will amount to one-third in value of the whole;³³ and, in fact, the sheriff need not assign to her any mines at all—*scil*, because the widow's part may consist wholly of surface lands set out by metes and bounds; or the sheriff may divide the profits of the mines between the parties, by directing, for example, the alternate enjoyment of the mines, or by giving the widow a part of the profits—especially where the mines are in the hands of the other persons."³⁴ In a New Jersey case it was said: "The only question that can arise will be in regard to the mode of assignment, whether by metes and bounds or by a share of the profits. That course will be adopted which will be most favorable to the widow, and which will most effectually secure the enjoyment of her right. There can be no difficulty in taking an account of the profit. It appears from the answer that the clay banks have been worked in connection with the farm, thus the profits of the clay may be ascertained as well as of any other part of the property. Working banks is a mere mode of enjoyment."³⁵

Gerkins v. Kentucky Salt Co., 36 S. W. Rep. 1.

³² Coates v. Cheever, 1 Cow. 460. See Dicken v. Hamer, 1 Drew and Sm. 284; 39 L. J. Ch. 778; 2 L. T. 276; Stoughton v. Leigh, 1 Taunt. 402, 410.

³³ Citing Stoughton v. Leigh, *supra*.

³⁴ Bainbridge on Mines (5th ed.), p. 30, citing Stoughton v. Leigh, *supra*.

³⁵ Rockwell v. Morgan, 2 Beas. (N. J.) Ch. 384.

Until assigned to her a widow is

§ 310. Remainderman enjoining extraction of oil or gas.

If the life-tenant, or anyone by his authority or under a lease from him, extracts the oil or gas from the land of the life estate, the remainderman may enjoin him, or the person acting under him or under the lease. The taking of the oil or gas without such remainderman's consent is waste.³⁶ The same rule applies where one joint tenant takes possession of the joint premises, to the exclusion of his fellow tenant.^{36a}

§ 311. Interest or royalties.

Although the life-tenant, or the owner for years, cannot open wells and extract oil or gas, yet if the remainderman takes out the oil or gas such tenant or owner for years will be entitled to interest on the value of the oil and gas thus taken out, and he may enforce his right by a bill in equity for an accounting.³⁷ So a widow entitled to dower in oil lands is entitled to interest on one-third of the royalties taken out.³⁸

not seized of any part of the land. *Haskell v. Sutton*, 53 W. Va. 206; 44 S. E. 533. If oil be extracted from land in which the widow has a dower interest she is entitled to interest on one-third of the amount taken out. *Stewart v. Tennant*, 52 W. Va. 559; 44 S. E. 223; *Findlay v. Smith*, 6 Munf. 134; *Lenfers v. Henke*, 73 Ill. 405; 24 An. Rep. 263.

³⁶ *Williamson v. Jones*, 39 W. Va. 231; 19 S. E. 436; *Williamson v. Jones*, 43 W. Va. 562; 27 S. E. 411; 38 L. R. A. 694; 64 Am. St. 891; *South Penn. Oil Co. v. McIntire*, 44 W. Va. 296; 28 S. E. 922; *Wilson v. Youst*, 43 W. Va. 826; 28 S. E.

781; *Blakeley v. Marshall*, 174 Pa. 425; 34 Atl. 564; *Appeal of Stoughton*, 88 Pa. 198; *Haskell v. Sutton*, 53 W. Va. 206; 44 S. E. 533.

^{36a} *Paxton v. Benedum-Trees Oil Co. (W. Va.)*, 92 S. E. 472.

³⁷ *Wilson v. Youst*, 43 W. Va. 826; 28 S. E. 78; *Blakeley v. Marshall*, 174 Pa. 425; 34 Atl. 564; *Eakins v. Hawkins*, 52 W. Va. 124; 43 S. E. 211; *Stewart v. Tennant*, 52 W. Va. 559; 44 S. E. 223; *Ammons v. Ammons*, 50 W. Va. 390; 40 S. E. 490.

³⁸ *Stewart v. Tannant*, 52 W. Va. 559; 44 S. E. 223.

CHAPTER XI.

CO-TENANTS.

- § 312. One co-tenant may operate land of co-tenancy for oil or gas.
- § 313. Lease or license granted by co-tenant.
- § 314. Partition of mines or mineral lands.
- § 315. Partition of oil or gas lands.
- § 316. Accounting between co-tenants.
- § 317. Accounting when tenant excludes co-tenant.
- § 318. Owner of surface not co-tenant with owner of mineral beneath surface.
- § 319. Purchase by tenant of co-tenant's interest.
- § 320. Equity jurisdiction of an accounting.
- § 321. Expense of working joint property.
- § 322. When a tenant bound by co-tenant's act.
- § 323. Injunction.
- § 324. Surrender of lease by co-tenant.
- § 325. Payment of rent or royalties.
- § 326. Fidelity relation between members of a mining partnership.

§ 312. One co-tenant may operate land of co-tenancy for oil or gas.

One co-tenant of land has the right himself to operate the land for oil or gas without the consent of his co-tenant; and this includes, of course, the right to sink wells and erect plants for that purpose. His fellow-tenant cannot prevent his operating the joint property, by refusing to join him in the enterprise. This is true of coal or other ore lands;¹ and the same

¹ Coleman's Appeal, 62 Pa. St. 252, affirming 1 Pearson 470; Clowser v. Joplin Mining Co., reported in note to Bly v. United States, 4 Dill. 469; Marsh v. Holley, 42 Conn. 453; Huff v. McDonald, 22 Ga. 131; McCord v. Mining Co., 64 Cal. 134; Watson v. U. R. and G. Gravel Co., 50 Mo. App. 635; Kahn v. Old Telegraph Mining Co., 2 Utah 13; Blewett v. Coleman, 40 Pa. St. 45; Coleman v. Blewett, 43 Pa. St., 176; Grubb's Appeal, 66 Pa. St. 117; Grubb v. Grubb, 74 Pa. St. 25; Grubb's Appeal, 90 Pa. St. 228;

Fulmer's Appeal, 128 Pa. St. 24; 18 Atl. Rep. 493; *contra*, Childs v. Kansas City, etc., Co., 117 Mo. 414; 23 S. W. Rep. 373; Murray v. Haverty, 70 Ill. 318; Hook v. Garfield Coal Co., 112 Ia. 210; 83 N. W. Rep. 963.

If a lease held by two tenants be forfeited, one of the tenants may then take a new lease on the premises without being held as a trustee for his fellow tenant. Westerman v. Dinsmore, 68 W. Va. 594; 71 S. E. 250.

is true of oil or gas lands.² Where a widow executed an oil and gas lease on lands on which she owned an undivided one-half and the other half belonged to her children, a subsequent lease of the same lands to a third party by the children after the youngest child had reached the majority conveys their undivided interest, it was held that each lessee is entitled to the possession of the premises to mine for oil and gas, but neither is entitled to exclusive possession.^{2a}

§ 313. Lease or license granted by co-tenant.

One co-tenant may grant a license or lease to dig in the joint property, but the right extends only to his interest;³ and if the lessee takes out ore he must account to the other co-tenant for the value of his share of the mineral taken out, less the expense of digging and removing it from the mines.⁴ The tenant not joining in the license or lease is not bound to accept his share of the royalty reserved, but may insist upon an accounting by the licensee or lessee according to the rule just stated.⁵ The licensee or lessee of one tenant cannot be considered a trespasser as to the other tenant; for he simply succeeds to the right of possession in his licensor or lessor, who had a right of possession equal to that of his fellow-tenant. Exclusion by the licensee or lessee of the other tenant

² *Williamson v. Jones*, 39 W. Va. 231; 19 S. E. Rep. 436; 25 L. R. A. 222; *Enterprise, etc., Co. v. National Transit Co.*, 172 Pa. St. 421; 33 Atl. Rep. 687; *Harrington v. Florence Oil Co.*, 178 Pa. St. 444; 35 Atl. Rep. 855; *Williams v. South Penn. Oil Co.*, 52 W. Va. 181; 43 S. E. Rep. 214; 60 L. R. A. 795.

See where it is held that one tenant cannot operate oil or gas lands without the other's consent. *Zeigler v. Brennehan*, 237 Ill. 15; 86 N. E. Rep. 597; *Watford Oil & Gas Co. v. Shipman*, 233 Ill. 9; 84 N. E. Rep. 53; 122 Am. St. 144. See, also *Murray v. Haverty*, 70 Ill. 318.

^{2a} *Compton v. People's Gas Co.*,

75 Kan. 572; 89 Pac. Rep. 1039; 10 L. R. A. (N. S.) 787.

³ *Omaha, etc., Co. v. Tabor*, 13 Colo. 41; 21 Pac. Rep. 925; 5 L. R. A. 236; *Tipping v. Robbins*, 71 Wis. 507; 37 N. W. Rep. 427; *Job v. Potton*, L. R. 20 Eq. 84; 44 L. J. Ch. 262; 23 W. R. 588; 32 L. T. 110; *Zeigler v. Brennehan*, 237 Ill. 15; 86 N. E. Rep. 597 (lease void as to tenants not joining therein).

⁴ *Tipping v. Robbins*, 64 Wis. 546; 25 N. W. Rep. 713; *Job v. Potton*, *supra*; *Gregg v. Roaring Springs, etc., Co.*, 97 Mo. App. 44; 70 S. W. Rep. 920; *Waterford Oil & Gas Co. v. Shipman*, 233 Ill. 9; 84 N. E. 53.

⁵ *Job v. Potton*, *supra*.

might destroy his rights, in which event such licensee or lessee would not be required to account.⁶ Each tenant may execute a separate lease, which will bind his interest; and the several lessees will each be entitled to operate the premises.^{6a}

§ 314. Partition of mines or mineral lands.

In a case of an attempted partition of a mine, Justice Brewer used the following language: "The mere fact of joint ownership in a mine does not give an equitable right to a partition. Seldom can a division of a mine be made. Generally partition must result in a sale. To such property there is an unknown value; and a chancellor may well require full information as to all the relations of the parties to the property before decreeing any partition which will practically result in dispossessing one of the parties entirely."⁷ And in a dictum in an Illinois case it was said: "The mines, when opened, in their nature were indivisible. Neither partition could be made at law, nor dower assigned by metes and bounds. The only partition that can be made is to order a sale of the mines and divide the proceeds."⁸ These were instances where the mines had been opened. Where the mine has not been opened, the right to partition of land having upon it solid minerals has been recognized;⁹ and it will be decreed unless the mineral is so situated that a probably fair division of it cannot be made by dividing the surface of the land.¹⁰ All things being equal, as between a partition and a

⁶ *Denys v. Shuckburgh*, 4 Y. and C. Exch. 42; 5 Jur. 21; *Ziegler v. Brenneman*, 237 Ill. 15; 86 N. E. 597.

A statute may, however, give a tenant a right of action against his fellow tenant for mining ore without his consent. *Murray v. Haverty*, 70 Ill. 318. See *Childs v. Kansas City, etc., Co.*, 117 Mo. 414; 23 S. W. Rep. 373.

Where a tenant in common leased the lands held in common to another to drill and operate for oil and gas, and thereafter the cotenants joined in a like lease to a different person, it was held that neither of the les-

sees had a right to operate without the other's consent. *Zeigler v. Brenneman*, 237 Ill. 15; 86 N. E. Rep. 597.

^{6a} *Compton v. People's Gas Co.*, 75 Kan. 572; 89 Pac. 1029; 10 L. R. A. (N. S.) 787.

⁷ *Aspen Mining, etc., Co. v. Rucker*, 28 Fed. Rep. 220.

⁸ *Lemfers v. Henke*, 73 Ill. 405.

⁹ *Hughes v. Devlin*, 23 Cal. 501; *Rainey v. Frick Coke Co.*, 73 Fed. Rep. 389.

¹⁰ *Wilson v. Bogle*, 95 Tenn. 290; 32 S. W. Rep. 386; *Conant v. Smith*, 1 Aiken 67; *Kemble v. Kemble*, 44 N. J. Eq. 454; 11 Atl. Rep. 733.

sale, a partition will be decreed.¹¹ By agreement not to apply for a partition, the owners may bar their right to it.¹² The interest of the several owners of a mine may be such, however, as to prohibit a partition, in which event a sale is the only relief. Thus in an Illinois case it was said: "If these two separate interests and titles were united in one person . . . the owner would have the right to sever the two estates by deed or devise. Where the owner would have that right there is no inherent difficulty in a court of chancery severing the two estates in a partition proceeding, where it is rendered necessary in the interest of justice, and decreeing the dominant estate to one and the servient estate to another. In recognizing this principle we are applying it to the facts of the particular case before us, where the defendants in error consented to accept the servient estate. We do not at this time determine the question whether a person not conversant with the management of the mine could be compelled to accept as his share a mine thus set off to him against his consent, or whether a mine could be set off to a minor."¹³ Thus where the owner in fee simple of certain lands granted an interest in them, in the following language: "An undivided third interest in a certain piece of mining ground," describing it, "together with the water-rights, reservoirs, and tale-race belonging to the same, and it is expressly conditioned that this instrument conveys no other right except a mining right on the premises above to the said party of the second part, his heirs and assigns," it was held that there could be no partition as between the grantor and grantee. "The grant," said the court, "does not convey the exclusive dominion of any portion of the ground so as to make the grantee a joint tenant or in common with the grantor. It conveys only a particular estate or incorporeal hereditament in land of which the grantor held the general estate."¹⁴ Thus water rights belonging to a mining claim cannot be partitioned.¹⁵ "Supposing that there may be

¹¹ *Boyston v. Miller, supra.*

¹² *Ames v. Ames*, 160 Ill. 599; 43 N. E. Rep. 592; *contra*, *Haeussler v. Missouri Iron Co.*, 110 Mo. 188; 19 S. W. Rep. 75; 16 L. R. A. 220.

¹³ *Ames v. Ames, supra.*

¹⁴ *Smith v. Cooley*, 65 Cal. 46; 2 Pac. Rep. 880.

¹⁵ *McGillivray v. Evans*, 27 Cal. 92.

a right and estate in a mine," said the Supreme Court of Massachusetts, "distinct from that of the soil in which it lies; there seems to be a peculiar fitness in resorting to equity to adjust and regulate the mutual rights of the parties. It is manifest that partition cannot be made by setting off the surface by metes and bounds, because the quantity and value of the mines and ores, and the capacity and facility of access for working them, bear no proportion to the area of the surface under which they lie. Indeed, in making partition at law, it has been found necessary to make special partition, directing the division of the profits, or the alternate enjoyment of the common property, as circumstances may require."¹⁶

§ 315. Partition of oil or gas lands.(a)

Discussion at length of partition of mines and mineral lands has been made in order to throw some light upon the right of partition of oil or gas lands. There is no doubt that an action of partition lies to divide undeveloped and supposable oil or gas lands, just as it does in case of lands containing solid minerals; for it cannot be known, owing to the peculiar character of gas or oil as a mineral whether the land to be divided is actual gas or oil lands; and to refuse partition on the theory that it may be, would be for the court to enter upon the domain of mere speculation or supposability. But after gas or oil has been discovered on the land, an entirely different question is presented. If the entire tract has been developed, and the wells are so distributed, and their production is well known so that their respective values can be determined, then a division might possibly be decreed; but it would be almost impossible to find

¹⁶ Adams v. Briggs Iron Co., 7 Cush. 361; Boston Franklin, etc., Co. v. Condit, 19 N. J. Eq. 394.

In Canfield v. Ford, 28 Barb. 336, a conveyance to one of "all the mines, ores, minerals and metals laying or being in or upon" a certain described tract of land, "together with the right to raise, work and carry away the same, the right

to put all buildings and to use all lands necessary for that purpose, and the right of ingress and egress for that purpose," words of inheritance being added, was held to pass a corporeal hereditament, an estate of inheritance, for a part of which an action of partition would lie.

(a) § 911.

an instance of this kind. And then, too, other powerful wells, in spite of the supposition that the land had been fully developed, might be sunk upon one part of the divided tract and all attempts to find other productive wells on the other tract might be failures. In such an event the partition proceedings would result in an unequal division in value, a thing studiously avoided in partition proceedings. The nearest approach to the question is one relating to a partition of water rights connected with a mining claim, which cannot be done;¹⁷ or of a running stream of water flowing through the joint property, or of streams under ground.¹⁸ Especially can there be no partition of the right to take oil or gas from beneath a tract of land, the surface being owned by a third person; and an attempt of the court to make partition of such a right is void.¹⁹

§ 316. Accounting between co-tenants.(a)

If one tenant work a mine, he must account to his co-tenant; and if he lease the premises, his co-tenant may exact his share of the rent or royalty,²⁰ or he may resort to the lessee and require him to pay the value of his share of ore taken out the same as he could do if his fellow-tenant had taken out the ore instead of leasing the right to do so.²¹ If the one tenant work

¹⁷ McGillivray v. Evans, 27 Cal. 92.

¹⁸ Willis v. Perry, 92 Ia. 297; 60 N. W. Rep. 727; 26 L. R. A. 124.

¹⁹ Hall v. Vernon, 47 W. Va. 295; 34 S. E. Rep. 764; 49 L. R. A. 464; Christy's Appeal, 110 Pa. St. 538; 5 Atl. Rep. 205 (coal); 9 Morr. Min. Rep. 42.

The Kansas statutory provisions (Gen. Stat. 1901, § 5101), do not apply to the partition of developed oil or gas lands. Beardsley v. Kansas Natural Gas Co., 78 Kan. 571; 96 Pac. Rep. 859. As to rule in Louisiana, see Gulf Refining Co. v. Hayne, 138 La. 555; 70 So. 509.

Where a tenant in common leased the lands held in common to another to drill and operate for gas and oil,

and thereafter all the tenants joined in a like lease to a different person, it was held that neither of the lessees could maintain partition to secure the interest so granted him. Zeigler v. Breneman, 237 Ill. 15; 86 N. E. Rep. 597. See also Waterford Oil & Gas Co. v. Shipman, 233 Ill. 9; 84 N. E. 53.

(a) §§ 876, 912.

²⁰ Job v. Potton, L. R. 20 Eq. 84; 44 L. J. Ch. 262; 23 W. R. 588; 32 L. T. 110; Denys v. Shuckburgh, 4 Y. and C. Exch. 42; 5 Jur. 21; Enterprise Oil and Gas Co. v. National Transit Co., 172 Pa. St. 421; 33 Atl. Rep. 687.

²¹ Mercur v. State Lime, etc., Co., 171 Pa. St. 12; 32 Atl. Rep. 1126.

the mine he must account to his co-tenant for his just share of the proceeds. In case of a gold mine where one tenant took more than his share of the proceeds it was said he must account to his co-tenant for the surplus and for all the profits made out of such surplus; and if there be no proof that he used such surplus, and no proof as to whether he made any profits out of it, the law will raise a presumption that he did make a profit out of it, and that the profits were equal to the legal rate of interest on the value of such surplus.²² If there be no dispute as to the amount mined, and the only question is the proportion of that amount the co-tenant is entitled to receive, *assumpsit* lies to determine that question.²³ Where the co-tenants were lessees of the mine from different owners of undivided portions of certain ore beds, it was held not to be a good defense on that part of the defendant tenant that he had accounted to his landlord for all he had taken out; for if he account for more than his proportion, he did so at his peril.²⁴ In a case where the fellow tenant had worked a coal mine, it was held that his co-tenant was entitled to recover the value at the pit's mouth of his share of the coal raised, less all costs of getting and raising it.²⁵ This might be termed the net profits; and this amount is reasonable.²⁶ This rule is applicable to the production of gas and oil. In a Pennsylvania case, in speaking with reference to a coal mine operated by one of the co-tenants, the Supreme Court said:

"It is urged, however, that before any liability to account can arise, it must appear that the co-tenant upon whom the demand for an account is made has actually taken out more than his just share or proportion of the entire mass of ore in the

²² *Huff v. McDonald*, 22 Ga. 131; *Coleman's Appeal*, 62 Pa. St. 252; *Grubb v. Grubb*, 101 Pa. St. 11; *Fulmer's Appeal*, 128 Pa. St. 24; 18 Atl. Rep. 493; *Goller v. Fett*, 30 Cal. 481; *McCord v. Mining Co.*, 64 Cal. 134; *Barnum v. Landon*, 25 Conn. 137; *Harrington v. Florence Oil Co.*, 178 Pa. St. 444; 35 Atl. Rep. 855.

²³ *Winton Coal Co. v. Pancoast Coal Co.*, 170 Pa. St. 437; 33 Atl. Rep. 110.

²⁴ *Barnum v. Landon*, 25 Conn. 137.

²⁵ *Job v. Potton*, *supra*.

²⁶ *Enterprise Oil & Gas Co. v. National Transit Co.*, 172 Pa. St. 421; 33 Atl. Rep. 687; *Williamson v. Jones*, 39 W. Va. 231; 19 S. E. Rep. 436; 38 L. R. A. 694.

beds or banks. It might be enough to say that the Act of Assembly makes no such provision. It applies to any case where coal, iron ore, or other mineral has been or shall be taken from the common property. It does not say or imply more than a just share or proportion. The remedy would be illusory if such a construction should prevail. No one can tell what the just share or proportion of each tenant will be until the whole mine or bank is exhausted of its entire deposit. In such a mass — practically inexhaustible for generations to come — it would make the one ninety-sixth part equal to the other ninety-five, and really destroy to that extent their proportionate value. Here a tenant in common exercises his undoubted right to take common property, and he has no other means of obtaining his own just share than by taking at the same time the shares of his companions. The value of the ore in place is therefore the only just basis of account. This is the same as the value of what is called ore leave — that is, what the right to dig and take the ore is worth. Indeed all parties, as well as the master and court below, seem eventually to have settled upon this basis. But how is the value of ore leave to be ascertained? It is evident in the nature of things that it can have no general market price. It will depend necessarily upon the position and circumstances of each particular mine, as well as on the character of the ore. The value of it at the pit's mouth depends upon its quality and its proximity to the furnace where it is to be used, and on the means of transportation. In addition to this, the price of ore leave will be influenced by the expense and risk of process of mining or taking it from its place to the pit's mouth. It is evident that the price given for ore leave in other mines or beds can afford no safe criterion, unless they should be precisely similar in all respects to the one in question. As to the Cornwall ore banks, no sale had ever been made of ore leave. No evidence was laid before the master as to what, in the opinion of the experts, ore leave in these banks would have commanded in the market. The master arrived at it by ascertaining the market value of the ore at the pit's mouth, and then deducting from that the cost of mining. We cannot see, under all the circumstances, that any more just and equitable mode could have been adopted. We

do not mean to say that it would hold in any other case than the one now before the court — certainly not where the mining is expensive and hazardous. Where the tenant in common of a coal mine, for example, must with great outlay of capital construct expensive machinery, and incur all the risks of such an undertaking, the value of ore leave or coal in place could not be ascertained by so simple a calculation. The usual profits embarked in such a hazardous enterprise, with the proper allowance for personal skill and attendance, would seem to be more than fair and reasonable deductions. Certainly any business man, sitting down to calculate what he ought to give for ore leave, would take all these elements into consideration. Otherwise, with his own capital and at his own risk, he would separate the ore from its natural position and place it on the surface, enhanced in value for the benefit of a stranger. We leave the rule in such a case to be determined when it arises.”²⁷

Where a fellow tenant has made an express promise of a certain sum as his co-tenant's share of operating gas or oil territory, assumpsit by the latter will lie against the former; but if no such promise has been made, then the only remedy is by account for a share of the profits. Under no circumstances in such a case is the co-tenant entitled to a share of the product taken out of the ground. Thus where all but one of several co-tenants of an oil lease assigned the entire lease for a share of the oil produced, to be delivered to a pipe line company to the credit

²⁷ Coleman's Appeal 62 Pa. St. 252; Williamson v. Jones, 43 W. Va. 562; 27 S. E. Rep. 411; Early v. Friend, 16 Gratt. 21; 78 Am. Dec. 619; Graham v. Pierce, 19 Gratt. 28; 100 Am. Dec. 658; McCord v. Oakland Quick Silver Mining Co., 64 Cal. 134; Trees v. Eclipse Oil Co., 47 W. Va. 107; 34 S. E. Rep. 933.

An oil lease gave the lessee the exclusive right to drill on the land during a certain period, and gave the lessor a one-sixth interest in the oil produced; the lessee to bear the cost of production. The lessor, without the lessee's consent, drilled a producing well on the tract, and the lessee sued upon the contract to

recover the product of the well, and a receiver was appointed by mutual agreement, without prejudice to the contentions of either party, to operate the well. The lessee recovered on the basis of the contract; the lessor being allowed the cost of drilling the well. It was held that since the lessee based its suit on contract, and the lessor did not occupy the position of a mere trespasser in the action, the costs of the receivership, being the expenses of production, should be charged against the lessee's share of the proceeds of the oil, so as to make the recovery conform to the terms of the contract. O'Neil v. Sun Co. (Tex. Civ. App.), 123 S. W. 172.

of those assigning; and one of the joint owners of the lease, who did not join in the assignment, notified the pipe line company not to deliver or pay for any of the oil so received by it to the assignors, it was held that the assignors were entitled to all the oil delivered to the pipe line company, and that the remaining joint owner could claim no part of it.²⁸ Three persons were joint owners of a lease. Two of them agreed that one of the two should work the oil well on it in place of a former employee employed by the owner of the third part. The owner of the third part did not assent to the arrangement, but received his share of the product. It was held that the latter was not liable to the part owner working the oil well for his share of the expense; but it was said that he might be liable to his co-tenants for the necessary expense and care of the oil produced, but not to the part owner working the well, because he had not employed him.²⁹ Nor can a joint tenant recover from his co-tenants the expense of pumping an oil well pumped against their consent, even though a statute gives a right of action by *assumpsit* against "any joint owner, joint tenant or tenant in common, holding an interest in and operating" an oil well for his share, unless a contract, either express or implied, be shown as the basis of the claim.³⁰ Where the lease is worked under an agreement, each owner must bear the loss of working it in proportion to their interests.³¹ In a case where a co-tenant had expended a large sum of money in working an oil lease, the court said: "I should think that a co-owner who has expended so large a sum, entirely at his own risk, but with the knowledge of the other co-owners, in so hazardous enterprise as developing oil in an unexplored field, ought not to do more than account for their proportion of a customary royalty, proper and fair under

²⁸ Enterprise Oil & Gas Co. v. National Transit Co., 172 Pa. St. 421; 33 Atl. Rep. 687; Johnston v. Price, 172 Pa. St. 427; 33 Atl. Rep. 688; 37 W. N. C. 387; 26 Pitts. L. J. (N. S.) 357; Murtland v. Callihan, 2 Super. Ct. (Pa.) 340.

²⁹ Thompson v. Newton (Pa.), 7 Atl. Rep. 64.

³⁰ Murtland v. Callihan, 2 Super. Ct. (Pa.) 340; Johnston v. Price, *supra*.

³¹ Harrington v. Florence Oil Co., 178 Pa. St. 444; 35 Atl. Rep. 855.

the circumstances."³² The basis of accounting, however, between tenants in common and joint tenants, for waste, caused by the extraction of oil or gas from the common property, under circumstances which make it reasonably certain that the party so taking the oil or gas, acted without fraud and under the belief of good title to himself to the whole of the property, though not without notice of defect of title, is the value of all oil produced from the land, less the whole cost of its production, including the cost of drilling producing wells. But if one co-tenant has executed a lease under which he has received rent for delay in beginning operations, he is not required to account to his fellow-tenant for such rents; for by their receipt the joint estate has not been impaired.^{32a}

³² *Williamson v. Jones, supra.*

Where several owners joined in a mining lease, reserving royalty, and one of them thereafter, in consideration of \$50, disclaimed any interest in and to, or advancement of royalty, amounting to \$900, paid by the managers of the lessee company to the lessors, it was held that each owner did not thereby disclaim all interest in future accruing royalties. *Hatfield v. Falloway*, 113 S. W. Rep. 853.

The Texas statute governing descent and distribution provides (Rev. St. 1895, art. 1689) that a surviving spouse shall be entitled to an estate for life in the lands of an intestate leaving issue, remainder to such issue. The grantees of remainders, occupying in severalty by virtue of the fee title of their grantors to two-thirds, but to the entire exclusion of the life tenant, prospected for and discovered oil. It was held that the life tenant was entitled to an interest in the oil produced, though at the time of descent cast the lands were farm lands.

The life tenant's right in the oil would extend only to interest on one-third of the proceeds of its sale, the principal to go to the remaindermen. *Lone Acre Oil Co. v. Swayne* (Tex. Civ. App.), 78 S. W. 380.

^{32a} *McNeely v. South Penn. Oil Co.*, 58 W. Va. 438; 44 S. E. 508; *Stewart v. Tennant*, 52 W. Va. 559; 44 S. E. 223; *Pyle v. Henderson*, 65 W. Va. 39; 63 S. E. 620; *Williamson v. Jones*, 43 W. Va. 562; 27 S. E. 411; 38 L. R. A. 694; 64 Am. St. 891.

If a cotenant ratify the lease of his fellow tenant, the accounting should include all money received by a fellow tenant for such lease, by way of bonus money or commutation money, and from royalty oils and gas rentals, or otherwise accruing under such lease. *Summers v. Bennett* (W. Va.), 69 S. E. 690.

If two persons jointly hold a lease, and it is forfeited, and one of them then take a new one, he does not become a trustee for the other one. *Westerman v. Dinsmore*, 68 W. Va. 594; 71 S. E. 250.

§ 317. Accounting when tenant excludes co-tenant.(a)

Where one tenant excludes his co-tenant under a claim of ownership of the entire tract, and then works the tract for the oil or gas that is in it, he must account to his co-tenant for his share of the product taken out, and will not be allowed to deduct therefrom any part of the expenses necessarily incurred in operating the wells on the tract.³³ In this case the defendant purchased of his co-tenant, by fraudulent representations, his interest in an oil lease; and upon demand for a reconveyance, the former offered to do so if the latter would pay his share of all the operating expenses incurred after the conveyance was made. This offer was refused; and in an action to recover his full share of the entire product it was held that no cost of securing it should be deducted. "Is the wrong-doer," asked the court, "entitled in such a suit to recoup from the value of a mineral as a chattel, the expense of mining or producing it? The mere statement of the proposition in this form suggests the only answer that can be given, unless it is the policy of the law to make the way of the transgressor easy and secure. The relation of the parties to each other, as co-tenants of the lease, and the fact that two of them, after fraudulently dispossessing the other, may have continued to use the property as it would probably have been used if they had all remained in possession, does not mitigate the tort nor qualify the ordinary rule of damages. Co-tenants are bound to respect the rights of each other quite as much as if they were strangers in title." This rule was applied where a life tenant, who was also a co-tenant in common, bored wells on the land, claiming it as his own. It was considered that he was a trespasser, and should not be allowed anything for the cost of production.³⁴

(a) §§ 876, 912.

³³ *Foster v. Weaver*, 118 Pa. St. 42; 12 Atl. Rep. 313.³⁴ *Williamson v. Jones*, 43 W. Va. 562; 27 S. E. Rep. 411; 38 L. R. A.694; 64 Am. St. 891. See also *Omaha, etc., Co. v. Tabor*, 13 Colo. 41; 21 Pac. Rep. 925; 5 L. R. A. 236.

§ 318. Owner of surface not co-tenant with owner of mineral beneath surface.

If one person own the surface and another the minerals beneath it, there is no co-tenancy existing between them. Therefore, there is not that relation between them that forbids one of them purchasing an outstanding title relating to the other's interest, and holding it adversely to him.³⁵ Thus where the owner of land conveyed it to his grantee, but reserved all the minerals beneath the surface, it was held that he could purchase the title of his grantee at a tax sale, and in that way acquire the title to the entire land.³⁶

§ 319. Purchase by tenant of co-tenant's interest.

In the purchase of his co-tenant's interest, a tenant is not bound to reveal to him the value of the interest he is purchasing, nor the fact that valuable minerals, or oil or gas exist upon the land they jointly own. There is no such relationship between them as requires him to disclose such facts. They deal with each other at arm's length.³⁷

§ 320. Equity jurisdiction of an accounting.

Under a contract specifying their individual interest in a lease held and the business of operating it by tenants as co-partners in pumping and selling the oil produced from a well thereon, a bill for an accounting is the exclusive remedy for the settlement of their accounts.³⁸ So equity has jurisdiction of suit for an accounting by the owners of an interest in an oil lease against the owner of the remaining part, although each party ran their own share of oil to their own credit and sold it,

³⁵ *Virginia Coal Co. v. Kelley*, 93 Va. 332; 24 S. E. Rep. 1020.

³⁶ *Hutchinson v. Kline*, 199 Pa. St. 564; 49 Atl. Rep. 312.

³⁷ *Neill v. Shamburg*, 158 Pa. St. 263; 27 Atl. Rep. 992. In this case it was further held that the fact that the purchaser had a mortgage

from the vendor on his interest did not alter their relations, so as to require a disclosure of the value of the interest purchased.

³⁸ *Johnston v. Price*, 172 Pa. St. 427; 37 W. N. C. 387; 26 Pittsb. L. J. (N. S.) 357; 33 Atl. Rep. 688. § 876, note 95.

where the latter kept account of all expense of operating the leasehold, under a statute giving courts jurisdiction in all cases where an action of "account rendered" would lie.³⁹ So equity has jurisdiction of a bill of discovery to ascertain the rights and relations of all the parties to an oil lease, and sublease thereunder, and for an accounting for the profits from the sale of gas.⁴⁰

§ 321. Expense of working joint property.

One tenant is not compelled to contribute to the working of gas or oil land⁴¹ unless he agree to do so; although a refusal to do so will not deprive him of a right to demand an accounting, as we have seen, elsewhere, for the oil or gas taken out.⁴² To permit one tenant, against the desires of his co-tenant, to engage in the operation of oil or gas lands; and charge him with a share of the operating expenses, might bring the latter to bankruptcy, or compel him to dispose of his land at a great sacrifice. And where a statute provided that any one performing labor in pumping an oil well might recover from any tenant in common of the premises, not, however, requiring the latter to pay any share of the expenses of operation commenced and carried on without his authority and consent, it was held that a tenant in common was not liable to pay for labor performed in pumping an oil well, where he offered to furnish a capable, and competent person to do the work; and his co-tenant refused to accept the services of such person or permit him to do the work.⁴³

³⁹ *Harrington v. Florence Oil Co.*, 178 Pa. St. 444; 35 Atl. Rep. 855.

⁴⁰ *Akin v. Marshall Oil Co.*, 188 Pa. St. 614; 41 Atl. Rep. 748.

⁴¹ *Taylor v. Fried*, 161 Pa. St. 53; 28 Atl. Rep. 993; *Baker v. Brennan*, 12 Ohio C. D. 211; 22 Ohio C. C. Dec. 241.

⁴² *Thompson v. Newton* (Pa.), 7

Atl. Rep. 64. As has been said, the amount allowed on an accounting where no other question is involved, is generally the usual royalty. *Williamson v. Jones*, 43 W. Va. 562; 27 S. E. Rep. 411; 38 L. R. A. 694.

⁴³ *Murtland v. Callahan*, 2 Pa. Sup. Ct. 340.

§ 322. When a tenant bound by co-tenant's act.

As a rule, a tenant is not bound by his co-tenant's act concerning the joint premises. But there may be instances in which he will be, aside from the question of partnership. Thus if it be necessary that certain work be done for the preservation of the joint premises, and his co-tenant do it or have it done, the other tenant will be liable for his proportionate share of the expenses, which is a lien on his interest.⁴⁴ So if one tenant have a valid lien on the joint estate, the other must contribute a share proportionate to his interest.⁴⁵ So if one of several joint lessees, with intent to surrender the lease as to all, and with the knowledge of his co-tenants, surrender the lease his co-tenants will be bound by his act.⁴⁶ So one of several joint lessors may accept a surrender of their lease so as to relieve the lessee from the payment of the rent.⁴⁷

§ 323. Injunction.

One co-tenant may maintain an action for an injunction against a trespassing stranger to preserve the joint property; and so he may maintain an action against his co-tenant who has taken possession of the joint property to his exclusion, is denying his title, and is working the joint property, on the ground that such act is one of waste.⁴⁸

§ 324. Surrender of lease by co-tenant.

One co-tenant in common cannot, without the consent of his fellow tenants, bind their interests by a surrender of their

⁴⁴ *Beck v. O'Connor*, 21 Mont. 109; 53 Pac. Rep. 94; *Haven v. Mehlgarten*, 19 Ill. 90; *Alexander v. Ellison*, 79 Ky. 148.

⁴⁵ *Eads v. Retherford*, 114 Ind. 273; 16 N. E. Rep. 587. See *Prentice v. Janssen*, 79 N. Y. 478; *Holbrooke v. Harrington*, 4 Cal. Unrep. Cas. 554; 36 Pac. Rep. 365.

⁴⁶ *Hooks v. Forest*, 165 Pa. St. 238; 30 Atl. Rep. 846.

⁴⁷ *Churchill v. Lammers*, 60 Mo. App. 244.

⁴⁸ *Williamson v. Jones*, 43 W. Va. 562; 27 S. E. Rep. 411; 38 L. R. A. 694; 64 Am. St. 891; See *Trees v. Eclipse Oil Co.*, 47 W. Va. 107; 34 S. E. Rep. 933. § 876, note 94.

lease,⁴⁹ unless he is given express (or perhaps implied) authority so to do.⁵⁰

§ 325. Payment of rent or royalties.

Where joint owners of land give an oil lease upon it, the lessee may pay the royalties or rent to both or either one of them; and if one of them convey his interest in the land or assign his interest in the lease, then payment may be made to the remaining lessor or to the assignee, and either can receipt for it.⁵¹

§ 326. Fidelity relation between members of a mining partnership.

There is not that relationship existing between tenants in common or partners of a mining partnership which forbids one tenant or one partner demanding and receiving a higher sum for his interest in the property than is paid therefor to his co-workers, as exists between members of an ordinary partnership and prevents such a transaction.⁵² Thus where it appeared that tenants in common of a mine had formed a mining partnership to develop the mine, showing profits and losses in proportion to their respective losses; but there was no such partnership formed for the purpose of selling the property; and the partners had settled up, and there was no further agreement to develop the mine; it was held that one partner who had sold his interest for more than his co-partners had received could not be made to account to them for the surplus, for, as to the mine, they were only tenants in common.⁵³ A partnership agreement to locate a mining claim is within the Statute of Frauds and must be in writing to bind the partners; and if it is not in writing, the remaining partners are without a remedy if one of their number takes title to a claim in his own name,

⁴⁹ *Edmonds v. Mounsey*, 15 Ind. App. 399; 44 N. E. Rep. 196; *Williams v. Vanderbilt*, 145 Ill. 238; 34 N. E. Rep. 476; *Hooks v. Forest*, 165 Pa. St. 247; 30 Atl. Rep. 846.

⁵⁰ *Hooks v. Forest*, *supra*.

⁵¹ *Swint v. McCalmont Oil Co.*,

184 Pa. St. 202; 41 W. N. C. 491; 38 Atl. Rep. 1021. See § 912, note 81.

As to release of royalty by one tenant, see *Hatfield v. Falloway*, 113 S. W. Rep. 853.

⁵² *Harris v. Lloyd*, 11 Mont. 390; 28 Pac. Rep. 736.

⁵³ *Harris v. Lloyd*, *supra*.

to their exclusion, unless partnership funds have been expended in its acquisition, in which event equitable relief will be given, on the ground of a resulting trust.⁵⁴ Where four purchased mining land from the State, only two giving bonds, with sureties, for the purchase money; and all but one left the State, abandoned the work, gave the remaining one no aid, allowing him to be pressed for money; and he surrendered the land to the State, and afterwards repurchased it in his own name, and sold it at a profit, it was held that he was not bound to account to his partners for the profit.⁵⁵ It was considered that the three partners had abandoned the enterprise.⁵⁶ Where certain parties purchased land for themselves, and represented to a company to be formed that they had purchased such lands for the proposed company, they having been obtained at first cost from the vendors; it was held to be a fraud upon those interested in the company to allow such purchasers to put them into the company at a price in advance of the actual cost price, without first informing such associates of the actual advance. They were required to account for the profits they had made in the transaction.⁵⁷ In a case of this character this language was used:

“There are two principles applicable to all partnerships or associations for a common purpose of trade or business which appear to be well settled on reason and authority. The first is, that any man or number of men, who are the owners of any kind of property, real or personal, may form a partnership or association with others, and sell that property to the association at any price which may be agreed upon between them, no matter what it may have ordinarily cost, provided there be no fraudulent misrepresentation made by the vendors to their associates. They are not bound to disclose the profit which they may realize by the transaction. They were, in no sense, agents or trustees in the original purchase, and it follows, that there

⁵⁴ *Craw v. Wilson*, 22 Nev. 385;
40 Pac. Rep. 1076.

⁵⁵ *Rhea v. Tatham*, 1 Jones Eq.
290.

⁵⁶ *Rhea v. Vannoy*, 1 Jones Eq.
282.

⁵⁷ *Simons v. Vulcan Oil, etc., Co.*,
61 Pa. St. 202. See *McElhenny's*
Appeal, 61 Pa. St. 188.

is no confidential relation between parties, which affects them with any trust. It is like any other case of vendor and vendee. They deal at arm's length. Their partners are in no better position than strangers. They must exercise their own judgment as to the value of what they buy. As it is succinctly and well stated in *Foss v. Harbottle*,⁵⁸ 'A party may have a clear right to say, I begin the transaction at this time. I have purchased land, no matter how or from whom, or at what price. I am willing to sell it at a certain price for a given purpose.' This principle was recognized and applied by this court in the recent case of *McElhenny v. Hubert Oil Co.*⁵⁹ 'It nowhere appears,' said the present Chief Justice, 'that McElhenny, the purchaser from Hubert, the original owner, did it as the agent of Messrs. Baird, Boyd & Co. and others, though he bought it to sell again, no doubt; he had a perfect right, therefore, to deal with them at arm's length, as it seems he did.' And, again: 'If the property was not purchased by McElhenny for the use, and as agent for the company, but for his own use, he might sell it at a profit, most assuredly. No subsequent purchasers from his vendees would have any right to call upon him to account for the profits made on his sale.' In that case, McElhenny, being the owner of property which had cost him only \$4,000, sold it to Baird, Boyd & Co. and others, who associated with him to form an oil company, for \$12,000, and it was decided that the company could not call him in equity to account for the profit he had made. The second principle is, that where persons form such an association, or begin to start the project of one, from that time they do stand in a confidential relation to each other, and to all others who may subsequently become members or subscribers, and it is not competent for any one of them to purchase property, for the purpose of such a company, and then sell it at an advance, without a full disclosure of the facts. They must account to the company for the profit, because it legitimately is theirs. It is a familiar principle of the law of partnership — one partner cannot buy and sell to the partnership at a profit; nor if a partnership is

⁵⁸ 2 Hare 489.⁵⁹ 61 Pa. St. 188.

in contemplation merely, can he purchase with a view to a future sale, without accounting for the profit. Within the scope of the partnership business, each associate is the general agent of the others, and he cannot divest himself of that character without their knowledge and consent. This is the principle of *Ilichens v. Congrove*,⁶⁰ *Fawcett v. Whitehouse*,^{*60} and the other cases which have been relied on by the appellants. It was recognized in *McElhenny v. Hubert Oil Co.*, just cited, and also in *Simons v. The Vulcan Oil Co.*⁶¹ Both of these cases were complicated with evidence of actual misrepresentations as to the original cost of the property to the vendors. In the opinion of the court in the last case, delivered by Thompson, C. J., it is said: 'If the defendants, in fact, acted as the agents of the company in acquiring the property, they could not charge a profit as against their principal. Nor was their position any better if they assumed so to act without precedent authority, if their doings were accepted as the acts of agents by the association or company. If in order to get up a company, they represented themselves as having acted for the association to be formed, and proposed to sell at the same price they paid, and their purchases were taken on these representations, and stockholders invested in a reliance upon them, it would be a fraud on the company, and all those interested, to allow them to retain the large profits paid them by the company, in ignorance of the true sums actually advanced.' The defendants in that case were subscribers, with others, to the stock of a projected oil company, and, after the plan had been formed, secured to themselves by contract the refusal of the property, which they afterwards sold to the company at a greatly advanced price."⁶²

⁶⁰ 4 Russ. 562.

^{*60} 1 Russ. and M. 132.

⁶¹ 61 Pa. St. 202.

⁶² *Densmore Oil Co. v. Densmore*,
64 Pa. St. 43.

CHAPTER XII.

CONTRACTS FOR A LEASE.

- § 327. Not often drawn into controversies.
- § 328. Indefiniteness.
- § 329. What is a sufficient writing.
- § 330. Effect of taking possession under contract.
- § 331. Specific performance of contract for lease.
- § 332. Specific performance of covenant in a lease.—Mandatory injunction.
- § 333. Damages for breach of contract to give lease.

§ 327. Not often drawn into controversies.

Contracts for leases of gas or oil lands are not often brought before the courts; but such contracts with reference to mining leases are not uncommon, and from these analogous cases we will draw a few illustrations.

§ 328. Indefiniteness.

If a contract for a lease be indefinite or uncertain in its terms, it cannot be enforced.¹ It must be an actual indefiniteness, and not an apparent one which can be removed by parol evidence.² Where the description is so indefinite as to not describe the premises, the contract cannot be enforced, even though the lessee be put into a possession of a part of them, in connection with another person asserting similar rights to a part of it; and if the lessee has not complied with all the agreements on his part, he is without a remedy.³ Mined products are continuously fluctuating in value, and for that reason time is of

¹ *Lancaster v. DeTrafford*, 31 L. J. Ch. 554; 7 L. T. 40; 10 W. R. 474; 8 Jur. (N. S.) 873. Cope, 25 Beav. 140; 27 L. J. Ch. 468; 4 Jur. (N. S.) 227; 31 L. T. (O. S.) 48; 6 W. R. 304.

² *Shardlow v. Cotterell*, 20 Ch. Div. 90; 51 L. J. Ch. 353; 45 L. T. 572; 30 W. R. 143; *Haywood v.* ³ *Lancaster v. DeTrafford*, 31 L. J. Ch. 554; 7 L. T. 40; 10 W. R. 474; 8 Jur. (N. S.) 873.

the essence of all contracts for a mining lease; and the contract in this respect must be definite.⁴

§ 329. What is a sufficient writing.

As an oil lease is an interest in lands, a contract to give one must be in writing in order to bind the owner of the land, the Statute of Frauds requiring this. The writing, to be a binding contract, must be signed by the owner of the land, but need not be by the person to receive the lease, though that is the usual practice.⁵ A formal agreement is not necessary, it is sufficient if there be a note or memorandum of the agreement containing the names of the parties, the consideration, and the subject matter.⁶ The contract may be embraced in two or more papers; and the language used in the several papers may be such as connect them without further evidence;⁷ but if the language used does not so connect them, parol or other evidence is admissible for that purpose.⁸ The contract may be signed by the agent of the property owner, without having been authorized in writing so to do; and if the person signing had no authority so to do, yet his act may be ratified and thus become binding.⁹ An agreement for a lease must be an actual agreement, and merely drawing up a written paper and signing it, when in fact there is no agreement will not make an agreement

⁴ *Pendergast v. Turton*, 13 L. J. Ch. 268; 5 Jur. 1102; 8 Jur. 205; *Huxham v. Llewellyn*, 21 W. R. 570; *Walker v. Jeffreys*, 1 Ha. 341; 11 L. J. Ch. 209; 6 Jur. 336; *London v. Mitford*, 14 Ves. 58; *Aloway v. Braine*, 26 Beav. 575; 33 L. T. 100.

⁵ *Laythorpe v. Bryant*, 2 Bing. N. C. 735; 5 L. J. C. P. 217; 3 Scott 238; 2 Hodges 25; *Seton v. Slade*, 7 Ves. 274.

⁶ *Williams v. Lake*, 2 El. and El. 349; 29 L. J. Q. B. 1; 6 Jur. (N. S.) 45; 1 L. T. 56; 8 W. R. 41; *Sale v. Lambert* L. R. 18 Eq. 1; 43 L. J. Ch. 470; 22 W. R. 478; *Rositer v. Miller*, 3 App. Cas. 1124;

48 L. J. Ch. 10; 39 L. T. 173; 26 W. R. 865.

⁷ *Boydell v. Dummond*, 11 East. 142.

⁸ *Nene Valley v. Dunkley*, 4 Ch. Div. 1; *Long v. Millar*, 4 C. P. Div. 450; 48 L. J. C. P. 596; 41 L. T. 306; 27 W. R. 720; *Pearce v. Gardner* [1897], 1 Q. B. 688; 66 L. J. Q. B. 457; 76 L. T. 441; 45 W. R. 518; *Cochrane v. Justice Mining Co.*, 16 Colo. 415; 26 Pac. Rep. 780.

⁹ *Dickinson v. Doodds*, L. R. 2 Ch. Div. 463; 45 L. J. Ch. 777; 34 L. T. 607; 24 W. R. 594; *Bel v. Balls* [1897], 1 Ch. 663; 66 L. J. Ch. 397; 76 L. T. 254; 45 W. R. 378.

that can be enforced.¹⁰ Part performance will dispense with a reduction of the agreement to writing; and such a part performance is where possession has been given and taken under the oral contract,¹¹ not where it has been taken without an agreement — or where possession has been continued by agreement, followed, in either instance by expenditures made upon the faith of the contract.¹² But a mere understanding is not sufficient, nor is what may be termed an “inchoate” agreement, as where the contract is not complete, one or more of the essential parts yet to be supplied. Such would be the case where the price, in an instance of a sale or lease, was not definitely fixed, even though all the other essentials were contained in the writing. But even in an instance of this kind, such an understanding may be rendered valid when works of an expensive character have been built upon the premises by the prospective grantee or lessee with the full knowledge of the grantor or lessor, upon the faith of the understanding being carried out by both parties,¹³ or if the inchoate agreement being completed,¹⁴ and the works so constructed would be useless by the determination of the understanding or inchoate agreement; but if there would be no such loss, then the understanding or inchoate agreement would not be carried out.¹⁵ It is not uncommon for parties to make a note or memorandum of a contract from which a formal

¹⁰ *May v. Thompson*, 20 Ch. Div. 705; 51 L. J. Ch. 917; 47 L. T. 295; *Bellamy v. Debenham* [1891], 1 Ch. 412; 60 L. J. Ch. 166; 64 L. T. 468; 39 W. R. 257. Of course a contract otherwise illegal cannot be enforced; and the mere fact that it is put in writing will not render it enforceable. *South African Territories v. Wallington* [1898], A. C. 309; 67 L. J. Q. B. 470; 78 L. T. 426; 46 W. R. 545.

¹¹ *Surcombe v. Pinniger*, 3 De G. M. and G. 571; 22 L. J. Ch. 419.

¹² *Hodson v. Heuland* [1896], 2 Ch. 428; 65 L. J. Ch. 754; 74 L. T. 881; 44 W. R. 684; *Neale v. Neale* 9 Wall 1; *Seavey v. Drake*, 62 N. H.

393; *Dawson v. McFaddin*, 22 Neb. 131; 34 N. W. Rep. 338; *Truman v. Truman*, 79 Ia. 506; 44 N. W. Rep. 721; *Moore v. Small*, 19 Pa. St. 461; *Freeman v. Freeman*, 43 N. Y. 34; 3 Am. Rep. 657; *Hardesty v. Richardson*, 44 Md. 617; 22 Am. Rep. 57; *Manly v. Howlett*, 55 Cal. 94; *Langston v. Bates*, 84 Ill. 524; 25 Am. Rep. 466; *Murphy v. Stell*, 43 Tex. 123; *Lester v. Lester*, 28 Gratt. 737.

¹³ *Jackson v. Cator*, 5 Ves. 687.

¹⁴ *Powell v. Thomas*, 6 Ha. 306.

¹⁵ *Bankart v. Tennant*, L. R. 10 Eq. 141; 39 L. J. Ch. 809; 23 L. T. 137; 18 W. R. 639.

contract is to be drawn up. This occurs also often in instances of negotiations by correspondence. Usually, if not always, these notes or memoranda contemplate the drawing up of a formal contract before there is a binding obligation between the parties. When such is the case, the failure to execute such a formal contract may or not terminate the relation of the parties or the enforceability of the negotiations or agreement. If the note, instrument or writings contain their final agreement it may be enforced, notwithstanding the fact that no formal agreement has ever been drawn up, for such note, instrument or writings contain their contract.¹⁶ If it does not contain the final agreement, it cannot be enforced.¹⁷ Of course, in all such instances the question is one of construction of the written note or memorandum.¹⁸ Where the contract arises out of an offer and acceptance, the acceptance must be as broad as the offer and not exceed it; for if the acceptance contain any qualification of the offer it will be regarded as a counter offer which will require the acceptance of the party making the first offer; in which instance the offer, counter offer and acceptance will constitute the contract for the lease.¹⁹ Thus in answer to an advertisement for bids for a lease of a mine, a mining company received a letter in which the writer offered "to take lease on the whole property at thirty-five per cent royalty at eighteen months, and agree to expend at least five thousand dollars every month in development work; I to have thirty days to begin work, in order to make examination of property, and put machinery in place. Lease to date from time of commencement of work. Settlement as usual." The officers of the mining company voted to accept the offer, and empowered its president to draw up a lease in conjunction with the person making the offer, and present it to the board of directors for their consideration. The

¹⁶ *Rossiter v. Miller*, 3 App. Cas. 1124; 48 L. J. Ch. 10; 39 L. T. 173; 26 W. R. 865; *North v. Percival* [1898], 2 Ch. 128; 67 L. J. Ch. 321; 78 L. T. 615; 46 W. R. 552.

¹⁷ *Lloyd v. Newell* [1895], 2 Ch. 744; 64 L. J. Ch. 744; 73 L. T. 154; 44 W. R. 43.

¹⁸ *Rossiter v. Miller*, *supra*.

¹⁹ *Pattle v. Hornibrook* [1897], 1 Ch. 25; 66 L. J. Ch. 144; 75 L. T. 475; 45 W. R. 123; *Routledge v. Grant*, 4 Bing. 660; *South Heton Coal Co. v. Haswell Coal Co.* [1898], 1 Ch. 465; 67 L. J. Ch. 238; 78 L. T. 366; 46 W. R. 355.

president at once telegraphed the bidder that the lease had been awarded to him; and this was held to constitute a binding contract for a lease, and the company could not insist that he accepted a lease which required him to do certain work regardless of its productiveness, and give it, the company, privileges, under certain contingencies, to dispose of the ore mined.²⁰

§ 330. Effect of taking possession under contract.

Usually one put into possession, under a contract for the purchase of real estate, before the actual completion of the purchase, waives the right to object to the vendor's title and for that reason refuse to complete the purchase. Care, however, must be observed in this connection. Thus there is a broad difference between a possession taken under a contract which provides that the title shall be a good one, and also provides that possession may be taken before the purchase is completed; and one under which possession is taken makes no provision for such a title. And where it is claimed that there was a waiver of a right to insist that a good title be shown before the purchase shall be completed, the distinction between instances where the vendor can remove the objections to the title, and those, to the knowledge of the vendee that they are not removable, must be borne in mind. And the reason for this is that where a vendee knows of defects in the title or conditions affecting it, and that the vendor has no control over them, by taking or remaining in possession of it, he waives his right to insist on the particular irremovable objections of which he had knowledge before he took possession.²¹ These rules, however, are not applicable in their full force to sales or leases of mines; for as their time is often of the essence of a contract, one who has agreed to accept the lease of a mine may take possession of it before the lease is granted, and his entrance will

²⁰ *Cochrane v. Justice Mining Co.*, 16 Colo. 415; 26 Pac. Rep. 780.

²¹ *In re Gloag and Miller's Contract*, 23 Ch. Div. 320; 52 L. J. Ch. 654; 48 L. T. 629; 31 W. R. 601;

Bown v. Stenson, 24 Beav. 631;

Burnell v. Brown, 1 J. and W. 168;

Stevens v. Guffy, 3 Russ. 171; 6 L. J. (O. S.) 164.

not be considered as an acceptance of the title of the lessor to grant the lease.²²

§ 331. Specific performance of contract for lease.(a)

Where a valid contract for a lease has been executed, a court of equity will decree a specific performance, and compel the execution of a lease in accordance with the terms of the contract, but the court will not decree a working of the premises to which the contract relates, leaving the parties to their action for damages.²³ And where damages will afford adequate relief, or there is an uncertainty in the contract, specific performance will not be decreed.²⁴ If the contract for a lease is not complete, then specific performance will not be decreed nor damages awarded; and an absence of any essential part in the contract will be fatal to the person claiming under it.²⁵ But mere uncertainty as to the identity of the land referred to, which may be removed by parol evidence, will not, however, defeat the action either for damages or for specific performance.²⁶ Only such a lease will be decreed as the contract calls for, without any variation from it.²⁷ If, pending the suit for a specific performance, the owner lessen the value of the lease-to-be, by extracting the thing for which the lease was granted, the court will award damages in that suit, or if they be not discovered until after the decree, in a supplemental action.²⁸ If there has been inadvertent misrepresentation on the part of the owner of the land, specific performance at his instance will not lie to compel the

²² Haywood v. Cope, 27 L. J. (N. S.) Ch. 468; 25 Beav. 140; 4 Jur. (N. S.) 227; 31 L. T. (O. S.) 48; 6 W. R. 304. See Davis v. Shephard, L. R. 1 Ch. App. 410; 35 L. J. Ch. 581; 15 L. T. 122; Smith v. Root, 66 W. Va. 633; 66 S. E. Rep. 1005.

²³ Wokerhampton R. R. Co. v. London, etc., R. R. Co., L. R. 16 Eq. 433; 43 L. J. Ch. 131; Powell Dufryn Coal Co. v. Taff Vale Rail Co., L. R. 9, Ch. App. 331; 43 L. J. Ch. 575; 30 L. T. 208. *Contra*, Browning v. Boswell, 215 Fed. 826.

²⁴ Ricketts v. Bell, 1 De G. and Sm. 335; 10 L. T. 105; 11 Jur. 918; Price v. Griffith, De G. M. and G. 80; 21 L. J. Ch. 78; 15 Jur. 1093; 18 L. T. (O. S.) 190.

²⁵ Maynell v. Surtees, 3 Sm. and G. 101.

²⁶ Doe v. Martin, 4 B. and Ad. 785; Price v. Griffith, *supra*.

²⁷ Carne v. Mitchell, 15 L. J. (N. S.) Ch. 287.

²⁸ Nelson v. Bridges, 2 Beav. 239; 3 Jur. 1098.

(a) § 922.

acceptance of the lease made pursuant to the terms of the contract,²⁹ and the same is much more so where both wilful misrepresentation and fraud have been used to induce the execution of the contract.³⁰ But mere vague commendation or puffing is not enough to defeat specific performance; ³¹ nor is glowing descriptions of the probable success of an adventure.³² Nor is there any misrepresentation such as will avoid the contract if the person complaining of them relied upon his own examination of the premises, or was not misled by them.³³ Occasionally a specific performance of a contract will not be decreed where the owner of the land has not been apprised of the value of the lease he has contracted to grant, as where he has been "surprised," as it were, into signing the contract. Thus where the plaintiff knew all about the value of the mining privileges, and the defendant did not, having recently purchased the land, and he hurried the defendant into signing the agreement, the court refused to decree a specific performance of the agreement, on the ground that an undue advantage had been taken of the defendant, and also on the suspicion that the royalties were grossly inadequate, as was alleged.³⁴ By delaying his action for specific performance — as, for instance, three years and a half — the person insisting upon a decree for it may lose his right to it.³⁵ Delay on the part of the owner in tendering a coal lease, until much of the coal has been taken out of the premises, will defeat his right to a decree for specific performance.³⁶

²⁹ *Higgins v. Samels*, 2 J. and H. 460; 7 L. T. 240; *Ricketts v. Bell*, *supra*.

³⁰ *Powell v. Elliott*, L. R. 10 Ch. App. 424; 33 L. T. 110; 23 W. R. 777.

³¹ *Jennings v. Broughton*, 5 De G. M. and G. 126; *Higgins v. Samels*, *supra*.

³² *Jennings v. Broughton*, 17 Beav. 234; 22 L. J. Ch. 585; 17 Jur. 305; 1 W. R. 441.

³³ *Jennings v. Broughton*, 5 De G. M. and G. 126; *Small v. Attwood*,

6 Cl. and F. 232; 2 L. J. Exch. 1; 1 Younge 407; *Colby v. Gadsden*, 34 Beav. 416; 11 Jur. (N. S.) 760; 12 L. T. 197.

³⁴ *Walters v. Morgan*, 3 De G. F. and J. 718; 4 L. T. 758.

³⁵ *Eads v. Williams*, 24 L. J. (N. S.) Ch. 531; 4 De G. M. and G. 674; 11 Jur. (N. S.) 193; 3 W. R. 98; 24 L. T. 162; *Macbride v. Weekes*, 22 Beav. 533; 2 Jur. (N. S.) 918; 28 L. T. (O. S.) 135; *Gee v. Pearse*, 2 De G. and Sm. 325.

³⁶ *Kille v. Reading Iron Works*,

§ 332. Specific performance of a covenant in a lease.—Mandatory.

Where a suit for damages occasioned by a continuing breach of the covenant in a lease will not give adequate relief, a suit for specific performance may be maintained by the injured party—as, for instance, by the lessor.^{30a} Such is especially true of a breach of the covenant by the lessee to furnish “free gas.”^{30b} And where a lease upon the premises was sold and at the time the purchaser knew that his vendor had contracted that all the oil produced on the property should be delivered to a pipe line company upon an agreed price, it was held that the purchaser of the lease was bound by the contract and could be compelled to deliver the oil, in accordance with the contract, by a mandatory injunction.^{30c}

§ 333. Damages for breach of contract to give lease.

Where a person enters into a contract to give a lease, and he has neither title to the land to be leased nor power to execute a

141 Pa. St. 440; 21 Atl. Rep. 666. Where a contract for a mining lease contained a clause permitting a surrender by the proposed lessee at any time on giving notice, it was held that a statute authorizing specific performance of an agreement for a lease did not authorize specific performance of such an agreement entered into without a valuable consideration, the lessee having nothing that would entail a loss on his part in case of its non-enforcement. *Grummett v. Gingrass*, 77 Mich. 369; 43 N. W. Rep. 999; *Watford Oil & Gas Co. v. Shipman*, 233 Ill. 9; 84 N. E. Rep. 53; *Ulrey v. Keith*, 237 Ill. 284; 86 N. E. Rep. 696.

^{30a} *Lockwood v. Carter Oil Co.*, 73 W. Va. 175; 80 S. E. 814.

^{30b} *Hall v. Philadelphia Co.*, 72 W. Va. 573; 78 S. E. 755.

^{30c} *Simmons v. Southern Pipe*

Line Company (Tex. Civ. App.), 195 S. W. 283; *Citing Texas Co. v. Central Fuel Oil Co.*, 194 Fed. 1; 114 C. C. A. 21; *Equitable Gaslight Co. v. Baltimore Coal Car Co.*, 63 Me. 285; *Gloucester Isinglass & Glue Co. v. Russia Cement Co.*, 154 Mass. 92; 27 N. E. 1005; 12 L. R. A. 563; 26 Am. St. 214.

In an oil lease, a clause entitling the lessee to surrender the lease at any time, but providing that the clause shall cease immediately and concurrently with the institution of any suit by the lessee to enforce the lease, or any of its terms, does not prevent a court of equity from granting relief to the lessee in the nature of specific performance, since, as soon as the suit is begun, the surrender clause becomes ineffective, so that the lease is no longer a unilateral contract. *Downey v. Gooch*, 240 Fed. 527.

lease, the person contracting with him has a right to and may recover substantial damages from him for the breach of the contract.³⁷ Such is not the case, however, where the title is merely defective, or where the lessor has some title; for there only nominal damages are recoverable. If the lease be granted and possession be taken or attempted to be taken under it, but the lack of title or defect in it be not discovered until after the lease be executed and such possession be taken or attempted, the lessee may recover substantial damages under the covenant for quiet enjoyment; and the same is true if there be an express covenant for title.³⁸

³⁷ Robinson v. Hurman, 1 Exch. 850; 18 L. J. Exch. 202; Hopkins v. Grazebrook, 6 B. and C. 31; 9 D. and R. 22; 5 L. J. (O. S.) K. B. 65.

³⁸ Flureau v. Thornhill, 2 W. Bl. 1078; Walker v. Moore, 10 B. and C. 416; 8 L. J. (O. S.) K. B. 159. See Engel v. Fitch, L. R. 3 Q. B. 314; 9 B. J. S. 85; 37 L. J. Q. B. 145; 18 L. T. 318; 16 W. R. 785.

Where the vendor of an interest in a lease retained the possession of it without being obliged to make a resale of it at a lower price, and he made no tender of a conveyance of it, it was held that he could recover only nominal damages. Carner v. Peters, 9 Pa. Super. Ct. Rep. 29; 43 W. N. C. 261.

CHAPTER XIII.

ADVERSE POSSESSION—STATUTE OF LIMITATIONS.

- § 334. Peculiarities of oil and gas.—Possession of surface.
- § 335. Rule as to oil and gas.
- § 336. Possession of surface not adverse to owner of oil or gas.
- § 337. Possession of oil operator not adverse to owner of surface.
- § 338. Acquiring right to oil or gas under Statute of Limitations.
- § 339. Receiver.—Title in dispute.—Injunction.
- § 340. Accounting.

§ 334. Peculiarities of oil and gas.—Possession of surface.

In discussing the question of adverse possession and the Statute of Limitations in regard to natural gas and oil, care must be taken to bear in mind the peculiar character of this fluid and this gas, and the ownership in them. The owner cannot claim them as his absolute property until he has reduced them to actual possession. While upon his territory he has a qualified property in them; but as soon as they pass from beneath the surface of his land, even that limited ownership is gone.¹ If the land has been leased for oil or gas purposes, it cannot be said merely because the lessor occupies the surface he has adverse possession of the oil and gas. The same rule applies to coal or any other mineral.²

¹ Westmoreland, etc., Co. v. De Witt, 130 Pa. St. 235; 18 Atl. Rep. 724; 5 L. R. A. 731; 29 Amer. L. Reg. 93.

² Catlin Coal Co. v. Lloyd, 176 Ill. 275; 52 N. E. Rep. 144; Catlin Coal Co. v. Lloyd, 180 Ill. 398; 54 N. E. Rep. 214; Caldwell v. Copeland, 37 Pa. St. 375; 72 Am. Dec.

760; Armstrong v. Caldwell, 53 Pa. St. 284; Plummer v. Hillside Coal & Iron Co., 160 Pa. St. 483; 28 Atl. Rep. 853; Moreland v. Frick Coke Co., 170 Pa. St. 33; 32 Atl. Rep. 634; Lulay v. Barnes, 172 Pa. St. 331; 34 Atl. Rep. 52; 37 W. N. C. 409; McBee v. Loftis, 1 Strob. Eq. 90.

§ 335. Rule as to oil and gas.

What is true of coal or other mineral, is also true of oil and gas. It is not sufficient to show, where title by adverse possession is claimed by the surface owner as against the claimant or owner of the gas, that such surface owner has had possession for a period equal in length to the period required to establish title to land by adverse possession, where there has been a severance of the ownership of the oil and gas from land.³ In speaking of adverse possession in such an instance, the Supreme Court of Pennsylvania said:

“They had put down a well, which had tapped the gas-bearing strata, and it was the only one on the land. They had it in their control, for they had only to turn a valve, to have it flow into their pipe, ready for use. The fact that they did not keep it flowing, but held it generally in reserve, did not affect their possession any more than a mill owner affects the continuance of his water right when he shuts his sluice gates. On the other hand, Brown had no possession of the gas at all. His possession of the soil for purposes of tillage, etc., gave him no actual possession of the gas; and he had no legal possession for his lease had conveyed that to another. How, then, had he taken, ‘full and absolute possession of the premises and rights,’ as found by the master; apparently, he had asserted to the complaints his claim that the lease was forfeited. In addition, on one occasion when the agent of complainants was at their well for a specific purpose, Brown had ordered him off the land; but there is no evidence that he went until he had finished his business there. Shortly before this the complainants had sent men on the land to begin the erection of a derrick for a second well, and Brown had ordered them off. This, which is the strongest item in the proof, is really no evidence at all of dispossession of complainants. They still remain in possession of their well, which gave them the sole control of the gas, so far as its utilization was concerned, and the sole pos

³ *Murray v. Allard*, 100 Tenn. 249; 66 Am. St. Rep. 740. § 886, 100; 43 S. W. Rep. 355; 39 L. R. A. note 18.

session of which it was capable, apart from the land, from which it had been legally severed by the lease. The utmost that can be said of such an occurrence is that it was a violent and temporary interference with that portion of complainant's rights which authorized them to put down a second well. This was no more a dispossession of complainants from their occupation of the gas than blocking up one of a farmer's roads to his house would be an ouster from his farm. We are therefore of opinion that the master was wrong in finding as a fact that complainants were out of possession, and should be remitted to an ejectment to establish their title at law."⁴

§ 336. Possession of surface not adverse to owner of oil or gas.

Possession of the surface is not an adverse possession of the oil or gas beneath it where such oil or gas is owned by another or rather where such other has a right to reduce it to possession. Such occupation, and even cultivation, is not even evidence of adverse enjoyment of the right to take oil or gas; and the mere non-user for a long period — as forty years — of the right to take it will not extinguish it, although it may work a forfeiture. "As the right was neither acquired nor evidenced by use, so we think it cannot be lost by misuse. And as there was no adverse enjoyment to raise the presumption of a conveyance or release of it, the right of those holding the written title remains unimpaired."⁵ In speaking of adverse possession of coal beneath the surface of a tract of land, the Supreme Court of Pennsylvania used the following language:

"It is no doubt, the general presumption that a party who has possession of the surface of land has possession of the sub-soil also, because, ordinarily the right to the surface is not severed from the right to the strata below the surface. But this presumption does not exist when these rights are severed.

⁴ Westmoreland, etc., Co. vs. De Witt, 130 Pa. St. 235; 18 Atl. Ap. 724; 29 Am. L. Reg. 93.

⁵ Said of coal beneath the surface. Arnold v. Stevens, 24 Pick.

106; Davis v. Clark, 2 Mont. 310; Kingsley v. Hillside Coal & Iron Co., 144 Pa. St. 613; 23 Atl. Rep. 250.

Each then becomes a distinct possession. In such a case, the possession of the surface, following the right, is as distinct from the possession of the minerals or subsoil strata which have been severed in right, as is the possession of one tract of land from that of another not in contact with it. Hence it is settled that when by a conveyance or reservation a separation has been made of the ownership of the surface from that of the underground minerals, the owner of the former can acquire no title by the Statute of Limitations to the minerals, by his exclusive and continual enjoyment of the surface. Nor does the owner of the minerals lose his right or his possession by any length of non-user. He must be disseised to lose his right; and there can be no disseise by act that does not actually take the minerals out of his possession. There seems to be no reason why the Statute of Limitations should not be held applicable to all corporeal hereditaments, including those that are only subsurface rights. . . . In *Caldwell v. Copeland*⁶ it was said that adverse possession of the mine by the owners of the surface for the statutory period would avail as title. But such possession must be distinct from that of the surface. It is unaided by surface rights or surface occupancy. What, then, is adverse possession of the coal in a tract of land, in a case where the owner of the land has by deed severed the ownership of the coal from the ownership of the surface? Its nature cannot be changed by the fact that it is more difficult of enjoyment. Like adverse possession of every other corporeal hereditament, it must be actual (as distinguished from constructive), exclusive, continued, peaceable and hostile for twenty-one years in order to give title under the Statute of Limitations. There is no reason for adopting a less stringent rule. The owner of the surface can acquire title against the owner of the minerals underneath by no acts or continuous series of acts that would not give title to a stranger. If the owner of a coal mine is not in actual possession, and the owner of the surface, or any other person, digs pits or drives adits into the minerals, and carries on mining operations there continuously for the statutory period ad-

⁶ 37 Pa. St. 427.

versely to the right of any other, he may acquire a right. In such a case he takes actual possession of the entire body of minerals in the tract of land. He may therefore acquire a title to the whole. But inasmuch as there cannot be any residence upon the coal, or cultivation without continual *pedis possessio*, or retention of the hold upon the mine, there can be no ouster of the owner, and consequently no acquisition of a right. If one digs turves or cuts wood upon another's land for his own use, and if he sells some of the turves he dug or the wood he cut to the neighbors, it is not pretended that he can acquire title to the land by such conduct, though repeated at intervals through the whole period of twenty-one years. . . . The court below, therefore, erred in leaving to the jury to find that the plaintiff had acquired title to the coal by having taken out some of it for family and neighborhood uses, at intervals during twenty-one years, without any evidence that the taking had been constant and continuous."⁷

§ 337. Possession of oil operator not adverse to owner of surface.

The lessee or the operator of oil wells under a lease does not have adverse possession of so much of the surface as he actually occupies with his machinery, wells, derricks, pipe lines, oil tanks and the like, as against the owner of the surface; and he cannot in that way obtain title, at least so long as there is oil to be pumped.⁸

§ 338. Acquiring right to oil or gas under Statute of Limitation.

Title may be acquired by adverse possession of solid mineral, but the possession must be of the actual mineral and not of the surface under which it lies where a severance of the mineral from the surface has taken place.⁹ But if one take possession of the surface, where no severance of the mineral has even taken place, adverse possession against the owner of the land will give title to the mineral beneath it; and a conveyance of

⁷ *Armstrong v. Caldwell*, 53 Pa. St. 284; *Wallace v. Elm Grove Coal Co.*, 58 W. Va. 449; 52 S. E. 485. How possession is averred. *Plant v. Humphreys*, 66 W. Va. 88; 66 S. E. 94; *Kiser v. McLean*, 67 W. Va. 294; 67 S. E. 725; 140 Am. St. 948. For a very excellent discussion of the question of adverse possession,

see *Barker v. Campbell-Ratcliff Land Co. (Okl.)*, 167 Pac. 468, where this section is cited.

⁸ *Dietz v. Mission Transfer Co.*, 3 Cal. Unrep. Cas. 354; 25 Pac. Rep. 423.

⁹ *Armstrong v. Caldwell*, 53 Pa. St. 284; *Caldwell v. Copeland*, 37 Pa. St. 427.

the mineral by the rightful owner before the statute has run will not be such a resumption of possession as will stop the running of the statute — it is not an entry upon the land.¹⁰ This must be an open and not a secret entry.¹¹ Suppose, however, that the owner of the surface should exclude the owner of the oil or gas beneath the surface from entering on such surface and drilling for the oil or gas for a period equivalent to the Statute of Limitations, and during that period such owner of the oil or gas had endeavored — either once or more than once — ineffectually to enter on the surface for the purpose of drilling — would not such acts be such an adverse possession as to defeat the right of the owner of the oil or gas? It seems to us it would. The rule applicable to tenants in common is probably the true one in such an instance. The owner of the oil has no power to secure it unless he can enter upon the surface; and if he is denied that right and excluded for the usual period of the Statute of Limitations applicable to adverse possession, it seems that he has lost his right to drill for and take the oil.¹²

§ 339. Receiver — title in dispute — injunction.

A receiver will be appointed to operate gas or oil wells when the title to the land is in dispute, in order to prevent a waste during litigation, or where the person taking the oil or gas is insolvent.¹³ So if one invade the premises of another and begin taking oil or gas, an injunction will be issued upon proper application, to restrain him.¹⁴ Where the claim of ownership of a person in possession dated back to a time prior to the right of entry, by parties who were out of possession, and the person in possession was solvent, and to issue an injunction would stop operations and the land during such cessure of

¹⁰ *Catlin Coal Co. v. Lloyd*, 180 Ill. 398; 54 N. E. Rep. 214; *Catlin Coal Co. v. Lloyd*, 176 Ill. 275; 52 N. E. Rep. 144; *Kingsley v. Hillside Coal Co.*, 144 Pa. St. 613; 23 Atl. Rep. 250; *Delaware, etc., Co. v. Hughes*, 183 Pa. 66; 38 Atl. 568; 63 Am. St. 743.

¹¹ *Finnegon v. Steinner*, 28 Pittsb. L. J. (N. S.) 68; 5 Pa. Super. Ct. Rep. 127; *Kingsley v. Hillside Coal*

Co., 144 Pa. St. 613; 23 Atl. Rep. 250.

¹² See *Erskine v. Forest Oil Co.*, 80 Fed. Rep. 583.

¹³ *Nevada Sierra Oil Co. v. Home Oil Co.*, 98 Fed. Rep. 673.

¹⁴ *Indianapolis Natural Gas Co. v. Kibby*, 135 Ind. 357; 35 N. E. Rep. 392.

operations would be drained by operations on other lands, the court refused to issue an injunction, and sent the parties to a court of law to establish their title to the land.¹⁵ Where in a bill to quiet title, it appeared, though the complainant claimed title, that the defendant was in possession, had drilled wells, removed oil from the premises, and was drilling more wells, the court refused to grant relief, sending the parties to a court of law to bring an ordinary action of ejectment.¹⁶

§ 340. Accounting.

Mere delay by the lessor in bringing a suit against the lessee for an accounting will not bar a recovery, if the action is not barred by the Statute of Limitations;¹⁷ and color has been lent to the claim that even the Statute of Limitations will not bar the right to an accounting.¹⁸ But, on the other hand, it has been held that the statute begins to run from the time an accounting can be demanded.¹⁹

¹⁵ *Erschine v. Forest Oil Co.*, 80 Fed. Rep. 583.

¹⁶ *California Oil and Gas Co. v. Miller*, 96 Fed. Rep. 12.

¹⁷ *Ahrns v. Chartiers Valley Gas Co.*, 188 Pa. St. 249; 41 Atl. Rep. 739; *Akin v. Marshall Oil Co.*, 188 Pa. St. 602; 41 Atl. Rep. 748.

¹⁸ *Williams v. Short*, 155 Pa. St. 480; 26 Atl. Rep. 662. A widow of a partner, where a managing partner continues to manage the prop-

erty after the death of his co-partner is not barred, as a rule, by the Statute of Limitations, from an accounting. *Thomas v. Hurst*, 73 Fed. Rep. 372. Secretly extracting mineral prevents the Statute of Limitations running until the extracting is discovered. *Lewey v. H. C. Frick Co.*, 166 Pa. St. 536; 31 Atl. Rep. 261; 28 L. R. A. 283.

¹⁹ *Summers v. Bennett*, 68 W. Va. 157; 69 S. E. 690.

CHAPTER XIV.

RESERVATION AND EXCEPTION.

- § 341. Distinction between reservation and exception.
- § 342. Severance of mineral by reservation or exception.
- § 343. Reservation of "all minerals" includes oil and gas.
- § 344. Reservation of right to drill for oil restricted.
- § 345. Ownership of gas or oil beneath public highways, rivers or sea.
- § 346. Reservation or exception subject to lien of judgment.
- § 347. Wife's interest in reservation.—Construction.
- § 348. Location of oil claim on public lands.
- § 349. United States Government lands, continued.
- § 350. Reservation of oil or gas on stock-raising homesteads.

§ 341. Distinction between reservation and exception.

The distinction between a reservation and an exception should be borne in mind. "A *reservation* is a clause in a deed whereby the grantor doth reserve some new thing to himself out of that which he granted before. This doth differ from an exception, which is ever a part of the thing granted, and of a thing *in esse* at the time: but this is of a thing newly created, or reserved out of a thing demised, that was not *in esse* before."¹ "A reservation is something taken from the whole thing covered by the general terms making the grant, and cuts down and lessens the grant from what it would be except for the reservation."² "An *exception* is something reserved by the grantor out of that which he has before granted. It is indispensable to a good exception that the thing excepted should be a part of the thing previously granted, and not of any other thing."³ "An exception is always a part of the thing granted, and of a thing in being; and a reservation is of a thing not in being, but newly created out of lands and tenements demised; though exception and reservation have often been used promiscuously."⁴

¹ Craig v. Wells, 11 N. Y. 315, quoting Shep. Touch 80.

³ Case v. Haight, 3 Wend. 632; Darling v. Crowell, 6 N. H. 421.

² Miller v. Lapham, 44 Ct. p. 434; Parsell v. Stryker, 41 N. Y. 480; Ryckman v. Gillis, 6 Lans. p. 79.

⁴ State v. Wilson, 42 Me. 9; Cunningham v. Knight, 1 Barb. 399; Gould v. Glass, 19 Barb. 179.

§ 342. Severance of mineral by reservation or exception.

A reservation or exception of all the mineral in a tract conveyed is a separation of the estate in the mineral from the estate in the surface. "A reservation of minerals and mining rights is construed as is an actual grant thereof." "A reservation of mineral and mining rights from a grant of the estate, followed by a grant to another of all that which was first reserved, vests in the second grantee an estate as broad as if the entire estate had first been granted to him with a reservation of the surface."⁵ Of course, what is true of a reservation is also true of an exception.⁶ In case of either a reservation or an exception, the grantor has a right to enter on the surface, with all the usual necessary appliances, to remove the mineral, without any express authority reserved to that effect.⁷ In case of a reservation of minerals, such mineral descends to the grantor's heirs.⁸ A reservation as large as the grant itself is void, and the grant is valid.⁹

§ 343. Reservation of "all minerals" includes oil and gas.

A clause in a deed of conveyance reserving "all minerals" has been held not to include petroleum, and by analogy not to include natural gas.¹⁰ But this decision has been greatly shaken

A deed had the following clause: "Reserving to said parties of the first part all the rights, privileges and benefits secured . . . under an oil and gas lease executed by said parties of the first part, the full power and right to renew or extend, exchange or modify said lease . . . as fully and to the same extent as though this conveyance had not been executed. It is intended hereby to reserve all oil and gas privileges in and to said premises." This was held to constitute an exception, and not a reservation; and the title to the oil and gas in the land remained in the grantors. *Moore v. Griffin*, 72 Kan. 164; 83 Pac. 395. See also *Murray v. Allred*, 110 Tenn. 100; 43 S. W. 355; 66 Am. St. 740; 39 L. R. A. 249.

⁵ *Marvin v. Brewster, etc., Co.*, 55 Ohio St. 538; *Farnum v. Platt*, 8 Pick. 339; *Munn v. Stone*, 4 Cush. 146; *Wardell v. Watson*, 93 Mo. 107; 5 S. W. Rep. 605.

⁶ *Snoddy v. Bolen*, 122 Mo. 479; 24 S. W. Rep. 142; 25 S. W. Rep. 932; *Norton v. Snyder*, 2 Hun 82; *Sloan v. Furnace Co.*, 29 Ohio St. 568; *Baker v. McDowell*, 3 W. and S. 358; *Shoenberger v. Lyon*, 7 W. and S. 184; *Whitaker v. Brown*, 46 Pa. St. 197; *Alden's Appeal*, 93 Pa. St. 182; *Foster v. Runk*, 109 Pa. St. 291; *Lillibridge v. Lackawanna Coal Co.*, 143 Pa. St. 293; 22 Atl. Rep. 1035.

⁷ *Wardell v. Watson, supra*; *Williams v. Gibson*, 84 Ala. 228; 4 So. Rep. 350; *Dietz v. Mission Transfer Co.*, 3 Cal. Unrep. Cas. 354; 25 Pac. Rep. 423.

⁸ *Whitaker v. Brown*, 46 Pa. St. 197.

⁹ *Shoenberger v. Lyon, supra*; *Foster v. Runk, supra*.

¹⁰ *Dunham v. Kirkpatrick*, 101 Pa. St. 36; 47 Am. Rep. 696. (In *Barker v. Campbell-Ratcliff Land Co. (Okl.)*, 167 Pac. 468, the court refused to follow this case).

in the State where it was rendered, by a subsequent decision holding that petroleum is a mineral substance obtained from the earth by process of mining and lands from which it is obtained may be designated as mineral lands.¹¹ In another case in another State, a reservation in deed of conveyance of "all mines, minerals and metals in and under the land" was held to include petroleum. "The first question to be determined," said the court, "is whether petroleum oil is included within the language of reservation of 'mines, minerals and metals.'¹² . . . Clearly, from this description of the substance, it could not in any sense fall under the terms 'metal' or 'metallic.' The question, then, to be determined is, does it fall within the term 'mines and mineral'? . . . In the most general sense of the term, minerals are those parts of the earth which are capable of being got from underneath the surface for the purpose of profit. The term, therefore, includes coal, metal, ores of all kinds, clay, stone, slate and coprolites. . . . The term is not limited to metallic substances, but includes salt, coal, paint, stone and similar substances. . . . We think, however, that the true meaning of the word 'mineral,' as well as its meaning among the bulk of mankind, must be determined from dictionaries and other similar authorities. We do not think that the bulk of mankind could be regarded as holding that the word 'mineral' applied only to metals." After reviewing a number of cases from other States, and especially Pennsylvania, the court concludes: "We are bound to hold that petroleum is a mineral and that it falls within the terms of the reservation in the deed. . . . The same is true of natural gas."¹³ In Ohio, however, in a case of a conveyance of

¹¹ *Gill v. Weston*, 110 Pa. St. 305; 1 Atl. Rep. 921.

¹² Quoting Century Dictionary.

¹³ *Murray v. Allard*, 100 Tenn. 100; 43 S. W. Rep. 355; 39 L. R. A. 249; 66 Am. St. Rep. 740. See also *Porter v. Mack Mfg. Co.*, 65 W. Va. 636; 64 S. E. 853; *Sult v. Hockstetter Oil Co.*, 63 W. Va. 317; 61 S. E. 307; *Williams v. South Penn. Oil Co.*, 52 W. Va. 181; 43 S. E. 214; 60 L. R. A. 795; *Columbia*

Gas & El. Co. v. Moore (W. Va.), 93 S. E. 1051; *Sult v. Hockstetter Oil Co.*, 63 W. Va. 317; 61 S. E. 307; *Gafrey v. Stowers*, 73 W. Va. 420; 80 S. E. 501. An allegation that a deed conveyed all coal and other minerals in a certain tract of land is an allegation in legal effect of the deed and asserts a conveyance of absolute title to the gas. *Columbia Gas & Oil Co. v. Moore*, *supra*.

"all the coal of every variety, and all the iron ore, fire clay, and other valuable minerals," in and under a certain described tract, giving the grantee in perpetuity the right "of mining and removing such coal, ore, or other minerals" and "right to the use of so much of the surface of the land as may be necessary for pits, shafts, platforms, drains, railroads, switches, side tracks, etc., to facilitate the mining and removal of such coal, ore, or other minerals, and no more," it was held that the deed did not pass the title to the petroleum oil and natural gas in such lands. "The words 'other minerals,' or 'other valuable minerals,' taken in their broadest sense, would include petroleum oil; but the question here is, did the parties intend to in-

Oil and gas are minerals, within the meaning of a reservation in a deed of "all mineral rights." *Barker v. Campbell-Rateliff Land Co.* (Okl.), 167 Pac. 468; citing this section, and *Gill v. Weston*, 110 Pa. 312; 1 Atl. 921; *Murray v. Allred*, *supra*; *Weaver v. Richards* 156 Mich. 320; 120 N. W. 818; *Sult v. Oil Co.*, 63 W. Va. 317; 61 S. E. 307; *Leahy v. Oil Co.*, 39 Okl. 312; 135 Pac. 416; *Superior Oil and Gas Co. v. Mehlin*, 25 Okl. 800; 108 Pac. 545; 138 Am. St. 942, and distinguishing *Detlor v. Holland*, 57 Ohio St. 492; 49 N. E. 690; 40 L. R. A. 266, and *Bernard Oil & Gas Co. v. Ferguhersan*, Ann. Cas. 1913 B, 1212.

In an early Pennsylvania case it was said "Oil is a mineral, and being a mineral, is part of the realty." *Funk v. Haldeman*, 53 Pa. St. 229, 249. Practically the same language was used in a West Virginia case in defining petroleum. *Williamson v. Jones*, 39 W. Va. 231; 19 S. E. Rep. 436; 25 L. R. A. 222.

Under a railroad grant reserving

minerals, it was decided that petroleum was included. *Union Oil Co.*, 25 Land. Dec. 351.

The United States land laws provide that "Any person authorized to enter lands under the mining laws of the United States may enter or obtain patent to lands containing petroleum or other mineral oil, and chiefly valuable therefore, under the provisions of the laws relating to placer and mineral claims." Act approved Feb. 11, 1897, 29 Stat. at Large 526; 2 Supp. R. S. U. S. 549.

The supreme Court of the United States has held that salt is not a mineral within the meaning of the mineral statutes, but in so doing it calls attention to the well known practice of the government in reserving salt springs from sale. *Morton v. Nebraska*, 21 Wall. 660. A recent act of Congress classes saline lands as mineral lands and locatable as placer. Act of January 31, 1901, 21 Stat. at Large 145. In Texas the opposite is held. *State v. Parker*, 61 Tex. 265.

clude such oil in the mining right? Taking all the terms of the conveyance in the light of the surrounding circumstances, and in view of the above rule of construction,¹⁴ and upon the authority of the case of *Dunham against Kirkpatrick*,¹⁵ we conclude that the title to the oil did not pass under said conveyance, but remained in the owner of the soil, and upon his death passed to his heirs. There is nothing to show that it was the intention of the parties that oil should be included in the word 'minerals,' and the easements granted, in connection with the mining right, are not applicable to producing oil¹⁶ and show that oil was not intended to be included in the conveyance. If it had been, apt words would have been used to express such intention."¹⁷ Where a contract was to convey the land but reserving all oil and gas in or under the said lands, with free mining privileges of all kinds, it was held that a deed of conveyance containing a clause "excepting and reserving all gas, oil, coal, ores and other mineral deposits in, under or on the said premises," was not a compliance with the contract;

¹⁴ Referring to *Barringer and Adams on the Law of Mines and Mining*, p. 131, where it is said: "In determining what is included in a lease, the familiar rules of construction are applied. The grant is construed most strongly against the grantor. The whole contract must be considered in arriving at the meaning of any of its parts. Terms are to be understood in their plain, ordinary, and popular sense, unless they have acquired a particular technical sense by the known usage of trade. They are to be construed with reference to their commercial and their scientific import. This rule is of especial importance when the question arises whether a specific mineral is included in a general designation."

¹⁵ 101 Pa. St. 36.

¹⁶ "Nothing is said about derricks, pipe lines, tanks, the use of water for drilling, or the removal of machinery used in drilling or operating oil or gas wells."

¹⁷ *Detlor v. Holland*, 57 Ohio St. 492; 49 N. E. Rep. 690; 40 L. R. A. 266.

A reservation of "all mines and ores of metal that are or may hereafter be found on the said lands, with the right . . . to mine and carry away the mineral thereon," covers only "mines and ores of metal and minerals in common use, and commonly known as such," does not cover marble, serpentine, or other building material, which, at the time the reservation was made, was not known to exist in the country. *Deer Lake Co. v. Michigan, etc., Co.*, 89 Mich. 180; 50 N. W. Rep. 807.

for by the contract the agreement was to convey the "coal, ores and other mineral deposits," as distinguished from "gas and oil."¹⁸ A deed contained this clause: "But it is expressly understood and agreed that there is reserved from and not included in the above sale or conveyance seven-eighths of all and any oil and gas that may be on, in or under said land, with full right and privilege to the grantor, his heirs and assigns, to develop and operate the same." This was held to except, and did not pass to the grantee the oil and gas produced on the land, and the oil and gas remained vested in the grantor as an actual vested estate and property, and was not an incorporeal hereditament in him nor a mere license to produce oil and gas, and the title in him to the oil and gas was not in abeyance to vest when the oil and gas should be developed and brought to the surface for the grantor. Consequently, a subsequent conveyance by the grantor of such oil and gas vested in the grantees like estate and property in the oil and gas as was vested in such grantor. This exception had the same effect as a reservation.^{18a} In the grant of land, an exception of the oil and gas and the right to go upon the land for them, is not defeated by the covenants for quiet possession of the land and freedom from encumbrances thereon. Such covenants relate only to the thing conveyed—the land without oil and gas—the land burdened with the right to operate for the oil and gas retained.^{18b} A conveyance of land, but excepting and reserving out of and from the grant at all times thereafter and forever, unto the grantor and his

¹⁸ *Moody v. Alexander*, 145 Pa. St. 571; 23 Atl. Rep. 161.

^{18a} *Preston v. White*, 57 W. Va. 278; 50 S. E. 236; *Peterson v. Hall*, 57 W. Va. 535; 50 S. E. 603; *Toothman v. Courtney*, 62 W. Va. 167; 58 S. E. 915; *Garrett v. South Penn. Oil Co.*, 66 W. Va. 587; 66 S. E. 741.

^{18b} *Kiser v. McLean*, 67 W. Va.

294; 67 S. E. 725; 14 Am. St. 984; *Barker v. Campbell-Ratcliff Land Co.* (Ok.), 167 Pac. 468 (explaining *Kolachmy v. Galbreath*, 26 Okl. 772; 110 Pac. 902; 38 L. R. A. (N. S.) 451, and *Frank Oil Co. v. Belleview Gas & Oil Co.*, 29 Okl. 719; 119 Pac. 260; 43 L. R. A. (N. S.) 487).

heirs and assigns one-tenth of all the mineral oil that may be obtained by the grantee, his heirs or assigns, from the land granted, to be delivered on the land to the grantor, his heirs or assigns, free of expense, except the furnishing of barrels or other means of transportation, is an exception and reservation in the grantor, his heirs or assigns, to be delivered as stipulated, a royalty of one-tenth of all the oil produced, possessing the same quality of estate as royalty reserved in an ordinary lease for oil and gas purposes. So that if the owner of the land lease it for oil and gas, reserving one-eighth royalty, without stipulating how the one-tenth of all the oil reserved in the prior grant is to be discharged, his lessee will be entitled to deduct the same from the one-eighth royalty oil reserved in the lease.^{18c}

§ 344. Reservation of right to drill for oil restricted.(a)

Under a reservation of a right to drill for oil or gas, the grantor, his heirs or assigns have a right to drill wells to prospect for oil or gas, even though there is no surface indication of either of them; but the lands cannot be used for the development of other lands, nor machinery used on other lands be stored on it, nor oil taken from other lands be stored on or transported over it.¹⁹ A conveyance of oil in land "except a well now producing oil," does not prevent the grantor sinking the well to a lower strata when it ceases to produce oil.^{19a}

^{18c} Jackson v. Dulancy, 67 W. Va. 309; 67 S. E. 795.

In a conveyance of oil and gas in place under the land conveyed, a reservation of title to one-eighth of the gas and oil is a covenant running with the land. Pierce Fordyce Oil Ass'n v. Woodrum (Tex.), 188 S. W. 245. See also Indiana Natu-

ral Gas Co. v. Harper, 50 Ind. App. 555; 98 N. E. 743.

(a) Forfeiture, § 886.

¹⁹ Dietz v. Mission Transfer Co., 95 Cal. 92; 30 Pac. Rep. 380; Dietz v. Mission Transfer Co., 3 Cal. Unrep. Cas. 354; 25 Pac. Rep. 423.

^{19a} Ammons v. Toothman, 59 W. Va. 165; 53 S. E. 13.

§ 345. Ownership of gas or oil beneath public highways, rivers or sea.

If the public own the fee in a public highway, then it may take all mineral beneath the surface of such highway, as in an instance of coal,²⁰ or of petroleum.²¹ If the public highway or street be abandoned, the fee, being a base fee, reverts to the person who dedicated it, in case of a dedication,²³ or if taken by right of eminent domain, to the abutting property owners, but such abutting lot owner cannot take the mineral from beneath the highway so long as it remains a public one.²⁴ In the Missouri case just cited it was said: "The street having been dedicated to public use as a thoroughfare, no private party (not even the city itself) had any authority or right to use it for any other purpose."²⁵ If the public have a mere easement, then the abutting land owner owns the minerals beneath the highway;²⁶ and the same is true where the public acquire only an easement by the right of eminent domain.²⁷ Yet it would seem that the owner of mineral beneath a highway may remove it, if he can do so without interfering with the public in the use of such highway.²⁸ But this is a rule of little if any practical

²⁰ *Union Coal Co. vs. City of La Salle*, 136 Ill. 119; 26 N. E. Rep. 506; 12 L. R. A. 326, an action to recover damages brought by a city against one taking the coal from beneath a street of the city. *Des Moines v. Hall*, 24 Ia. 234; *Hawesville v. Hawes*, 6 Bush. 232.

²¹ *Ontario Natural Gas Co. v. Gasfield*, 18 Ontario App. 626.

²² *Matthiesson, etc., Co. v. La Salle*, 117 Ill. 411; 2 N. E. Rep. 406; 8 N. E. Rep. 81.

²³ *Matthiesson, etc., Co. v. La Salle, supra*; *Friend v. Porter*, 50 Mo. App. 89.

²⁴ In *Union Coal Co. v. City of La Salle, supra*, the court declined to pass on the right of the city to sell the coal beneath the street. In *Ontario Natural Gas Co. v. Gasfield, supra*, a statute authorized a township to sell or lease the gas or oil beneath the surface of any public highway.

²⁵ *Tousley v. Galena, etc., Co.*, 24 Kan. 328; *Smith v. Rome*, 19 Ga. 89.

²⁷ *Smith v. Holloway*, 124 Ind. 329; 24 N. E. Rep. 886; *Kelly v. Donahoe*, 2 Mete. (Ky.) 482; *Evans v. Haefner*, 29 Mo. 141; *Goodtitle v. Alker*, 1 Burr. 143; *Holmes v. Bellingham*, 7 C. B. (N. S.) 329; *Berridge v. Ward*, 10 C. B. (N. S.) 400; 30 L. J. C. P. 218; 7 Jur. (N. S.) 876; 2 F. and F. 208; *Lyman v. Arnold*, 5 Mason 195; *Fisher v. Rochester*, 6 Lans. 225; *Robert v. Sadler*, 104 N. Y. 229; 10 N. E. Rep. 428.

²⁸ *Robert v. Sadler, supra*; *Perley v. Chandler*, 6 Mass. 453; *Old Town v. Dooley*, 81 Ill. 255; *Winchester v. Capron*, 63 N. H. 605; *Williams v. Kenney*, 14 Barb. 629. But of this the laws are conflicting as can be seen in citation 24.

value in cases of oil and gas. For an oil or gas well must necessarily be an obstruction of the highway when sunk in it, and especially the machinery used in sinking and operating it; ²⁹ and, therefore, it is practically impossible to make use of a highway in order to extract the oil or gas beneath its surface. As the public authorities only have the right to use the highway for the purposes of the public in traveling, they have no power to let any part of it for oil or gas operations, unless especially authorized by a statute to do so, and then only when the public own the fee. The owner of land dedicating it to the public for a highway may reserve the mineral beneath its surface; and in such an instance he may remove it; ³⁰ and if he convey the abutting property, his grantee is the owner of the mineral.³¹ Mineral beneath a navigable river or the sea belongs to the State.³² Oil or gas beneath a railroad's right of way belongs to the adjoining landowner or landowner through whose land it runs, when such right of way is only an easement.^{32a}

§ 346. Reservation or exception subject to lien of judgment.

A reservation or exception of the gas or oil, or other mineral, beneath the surface of a tract of land conveyed is subject to a lien of a judgment taken against the grantor after the conveyance containing the reservation or exception has been made.³³

§ 347. Wife's interest in reservation.—Construction.

Husband and wife conveyed by deed certain real estate in fee simple, reserving to themselves the equal one-half part of the usual royalty of one-eighth of all the oil underlying the tract conveyed. In the deed it was expressly stated that they did not convey thereby such one-eighth of the oil. The grantee of

²⁹ State v. Berdette, 73 Ind. 185; 38 Am. Rep. 117; 20 Amer. L. Reg. 342.

³⁰ Dubuque v. Benson, 23 Iowa 248.

³¹ Tousley v. Galena, etc., Co., 24 Kan. 328; Snoddy v. Bolen, 122 Mo. 479; 25 S. W. Rep. 932.

³² 2 Bl. Com. p. 18. See Pittsburgh, etc., Co. v. Lake Superior Iron Co., 118 Mich. 109; 70 N. W. Rep. 395.

In Ventura County, California,

many oil wells have been drilled in the ocean, some as far as two hundred yards from the shore. In the Gulf of Mexico, off the Texas coast many miles, it is said that oil floating on the water can be readily discerned.

^{32a} Consumers' Gas Trust Co. v. American Plate Glass Co., 162 Ind. 392; 68 N. E. Rep. 1020.

³³ First National Bank v. Dow, 41 Hun. 13. See Thompson v. Matern, 115 Pa. St. 501; 9 Atl. Rep. 70.

the tract of land afterwards leased it with the exclusive right to drill and operate for oil and gas, reserving one-eighth part of all the oil obtained from the premises as produced in the crude state. It was held that the reservation in the lease vested in the lessor one-eighth of the oil, but did not include the one-eighth which was outstanding in the wife of the original grantor.³⁴

§ 348. Location of oil claim on public lands.

Lands of the United States containing oil is subject to location the same as any other mineral land.³⁵ To render the land subject to location under the mining laws, the locator must know that oil exists on the land, the fact that surface indications were such as to point to the fact that oil might exist not being sufficient, or a mere conclusion, drawn from other facts, that it does exist is not a sufficient discovery. Nor is it sufficient that oil is known to exist in a nearby territory; or that another person other than the locator knows it exists; but the locator may so acquire his knowledge of the existence of oil, and so step into his shoes, as it were, as to render his title by location valid.³⁶

³⁴ *Harris v. Cobb*, 49 W. Va. 350; 38 S. E. Rep. 559.

³⁵ Act of February 11, 1897, 29 Stat. at Large 526; 2 Supp. R. S. U. S. 549. See §§ 33 and 292.

³⁶ *Nevada Sierra Oil Co. v. Home Oil Co.*, 98 Fed. Rep. 673; *Nevada Sierra Oil Co. v. Miller*, 97 Fed. Rep. 681; *Gird v. California Oil Co.*, 60 Fed. Rep. 531; *Olive Land, etc., Co. v. Olmstead*, 103 Fed. Rep. 568; *Cosmos, etc., Co. v. Gray Eagle Oil Co.*, 104 Fed. Rep. 20; *Bay v. Oklahoma Southern Gas, etc., Co.*, 13 Okl. 425; 73 Pac. Rep. 936.

I give a digest of the cases relating to oil claims in this connection:

Public lands of the United States, subject to settlement and occupancy, containing petroleum or other min-

eral oil chiefly valuable therefor, may be entered and patent obtained under Act February 11, 1897, relating to placer mining. *Bay v. Oklahoma Southern Gas, Oil & Mining Co.*, 73 P. 936; 13 Okl. 425.

Under the laws of Congress and proclamation of the President opening lands acquired by treaty from the Indians in Oklahoma, none other than one who has been awarded the right to make the homestead entry after August 6, 1901, was permitted to occupy any of such lands, for the purpose of discovering oils or making mineral locations, until after October 5, 1901, and any entry or occupation prior to such date conferred no rights on the claimant. *Bay v. Oklahoma Southern Gas, Oil*

& Mining Co., 73 P. 936; 13 Okl. 425.

Act Congress February 11, 1897, c. 216, 29 Stat. 526 (U. S. Comp. St. 1901, p. 1434), provides that the location of oil claims shall be governed by the mineral laws of the United States applicable to the location of placer mining claims. Rev. St. U. S. § 2324 (U. S. Comp. St. 1901, p. 1426), provides that the location of any mining claim must be distinctly marked on the ground, and there must be a discovery of minerals within the limits of the land located. It was held that to constitute a valid location of an oil claim the locator must have actually discovered oil within the limits of the claim. *Miller v. Chrisman*, 73 P. 1083; 74 P. 444; 140 Cal. 440.

A *fraudulent and clandestine entry* on the oil claim of another with knowledge of the latter's occupancy of the territory cannot be made the basis of any right. *Miller v. Chrisman*, 73 P. 1083; 74 P. 444; 140 Cal. 440.

Where a location of an oil claim was made by an association of persons, the associates acquired a right to the claim before the location was perfected, which they could convey. *Miller v. Chrisman*, 73 P. 1083; 74 P. 444; 140 Cal. 440.

Where a location of an oil claim was invalid, the abandonment and relinquishment thereof by the grantee of the locator did not invalidate a location subsequently made by the grantee. *Miller v. Chrisman*, 73 P. 1083; 74 P. 444; 140 Cal. 440.

It is a condition precedent to the location of a mining claim that a discovery must be made, and in the case of petroleum or mineral oils the deposit from which the oil is drawn must be discovered before

a valid location can be made. *Bay v. Oklahoma Southern Gas, Oil & Mining Co.*, 73 P. 936; 13 Okl. 425.

A location of an oil claim, embracing 160 acres of land, made by an association of persons, is but a single location, covering 160 acres, and not eight locations, each covering 20 acres, and therefore a single discovery of oil is sufficient to support it. *Miller v. Chrisman*, 73 P. 1083; 74 P. 444; 140 Cal. 440.

It is not essential to the validity of an oil or mineral claim that the *discovery* of oil or mineral within its limits shall have preceded or shall coexist with the posting of the notice and the demarkation of the boundaries, but the discovery may be made subsequently, and when made operates to perfect the location against the world, save those whose *bona fide* rights have intervened. *Miller v. Chrisman*, 73 P. 1083; 74 P. 444; 140 Cal. 440.

Where *no discovery* of oil is made under an oil claim, the locator is not in the actual *bona fide* possession of the claim, and therefore the same is open to peaceable entry by others. *Miller v. Chrisman*, 73 P. 1083; 74 P. 444; 140 Cal. 440.

Where defendants entered upon unappropriated land, and performed all the acts necessary for the location of an *oil placer mining* claim, except discovery, by staking the land, putting up notice, and recording the claim, while they were in actual possession, plaintiffs could not claim the land so held by defendants, and it was immaterial that the discovery under which defendants claimed was on the boundary line of their claim, and they had also claimed title to another claim on the strength of the same well, since the only question was whether

defendants' location and possession was prior to that of plaintiffs. *Phillips v. Brill*, 17 Wyo. 26; 95 P. 856.

It is a general rule that a mining location, to be valid, must be good when made, and that a right cannot be initiated by a trespass. *Phillips v. Brill*, 17 Wyo. 26; 95 P. 856.

Where defendants entered upon vacant and unappropriated land, and performed all acts necessary for the location of an *oil placer mining claim*, except discovery, by staking the land, putting up notice, and recording the claim, they had a right to take actual possession, and continue therein for a reasonable time, while exploring the land for the purpose of discovery; and the acts of location would indicate, not only the extent of the surface intended to be appropriated, but the extent of such possession, and the locators would be protected against the forcible, fraudulent, or surreptitious intrusion of others; and a delay in taking possession would not affect the rights of the locators, if at the commencement of their possession the rights of others had not intervened. *Phillips v. Brill*, 17 Wyo. 26; 95 P. 856.

An *oil placer mining claim* will not be invalidated by the fact that the discovery shaft or well bisects the boundary line of a claim and is partly on the claim and partly on another. *Phillips v. Brill*, 17 Wyo. 26; 95 P. 856.

In an action to establish an *oil placer mining claim*, the fact that *one-half of the diameter of the well is on the claim* was a sufficient showing of discovery within the claim; and it may not be inferred that the well deviated away from the claim in its descent, in the absence of evidence to the contrary. *Phillips v. Brill*, 17 Wyo. 26; 95 P. 856.

Where plaintiffs located eighty acres of public oil land, and made a discovery thereon, and thereafter located 160 acres, which included the eighty acres first located and an eighty-acre tract adjoining, then in the possession of another, plaintiffs' *prior discovery on the first eighty acres* was unavailable for the purpose of perfecting a consolidated claim to the 160-acre tract. *Weed v. Snook*, 77 P. 1023; 144 Cal. 439.

The discovery of oil in public land located as a placer oil mining claim, after the posting of notice and the marking of the claim, is available for the purpose of perfecting the locator's claim thereto, in the absence of intervening rights of third persons. *Weed v. Snook*, 77 P. 1023; 144 Cal. 439.

Where a lessee of a placer oil mining location was in possession, and was actively at work, and expending money for the purpose of sinking an oil well and discovering oil on the claim, the rights of such lessee could not be forfeited to third persons during the progress of such work, who attempted to relocate the land on the ground that the original locator or such lessee had not actually discovered oil in the land prior to such location. *Weed v. Snook*, 77 P. 1023; 144 Cal. 439.

Where public land was located as oil land, failure of the locators to discover oil, in the absence of a retention of possession and a prosecution of the work, was fatal to the validity of such location under Act February 11, 1887, c. 216, 29 Stat. 526 (U. S. Comp. St. 1901, p. 1434), providing that the entry of petroleum lands shall be governed by the law relating to placer claims. *New England & Coalinga Co. v. Congdon* 152 Cal. 211; 92 P. 180.

§ 349. United States Government lands, continued.

This act of Congress of February 11, 1897, provides that any person authorized to enter lands under the mining laws may enter and obtain patents to lands containing petroleum and mineral oils and chiefly valued therefor under the laws relating to placer mineral lands. This act applies to entries before its enactment. By an act of June 25, 1910, the President is empowered to withdraw temporarily from settlement, location, sale or entry any of the public lands of this country and Alaska, and reserve them for water power; but these lands are subject to entry for coal, oil and gas development. The rights of persons

There can be no valid location of petroleum lands, under the mineral laws relating to placer claims, without a prior valid discovery of mineral within the limits of the claim. *Nevada Sierra Oil Co. v. Miller*, 97 Fed. Rep. 681.

Even as between rival mineral claimants to petroleum lands, there must have been such a discovery, in order to sustain a location, as would justify a prudent person in the expenditure of money and labor in exploitation for petroleum. *Miller v. Chrisman*, 73 P. 1083; 140 Cal. 440; 98 Am. St. Rep. 63, and 74 P. 444; 140 Cal. 440; 98 Am. St. Rep. 63, affirmed. *Chrisman v. Miller*, 25 S. Ct. 468; 197 U. S. 313; 49 L. Ed. 770.

A provision in a lease conferring "such other rights and privileges as are vested in mines under the laws of the United States and of the state," rather than be treated as meaningless, will be construed as if it read "miners" in place of "mines." 70 P. 470, reversed on rehearing. *Swift v. Occidental Mining & Petroleum Co.*, 74 P. 700; 141 Cal. 161.

Where the terms of a lease are not clear as to the right of the lessee

to use petroleum from the land as fuel without accounting, but the lessors acquiesced in such use, this is, at least, a waiver by them of their right. 70 P. 470, reversed on rehearing. *Swift v. Occidental Mining & Petroleum Co.*, 74 P. 700; 141 Cal. 161.

Evidence held insufficient to sustain findings that the lessees of land containing petroleum had prosecuted the work of developing the mines during the term, as required by covenants in the lease. 70 P. 470, reversed on rehearing. *Swift v. Occidental Mining & Petroleum Co.*, 74 P. 700, 141 Cal. 161.

On the issue whether a lessee had performed its covenant to explore and develop an oil claim, evidence of the amount expended for that purpose was properly admitted, but not to excuse a subsequent cessation of the work. 70 P. 470, reversed on rehearing. *Swift v. Occidental Mining & Petroleum Co.*, 74 P. 700; 141 Cal. 161.

For cases of solid mineral, on this point, see *Dower v. Richards*, 151 U. S. 658; 14 Sup. Ct. Rep. 452; *McCormick v. Sutton*, 97 Cal. 373; 32 Pac. Rep. 444; *Francoeur v. Newhouse*, 43 Fed. Rep. 236;

who are *bona fide* occupants or claimants of gas or oil bearing lands and who, at the time of the withdrawal, are in diligent prosecution of work leading to discovery of oil or gas, are preserved. There are certain other provisos which can be readily ascertained by an examination of the act.³⁷ By an act of March 2, 1911, it is provided that in no case shall a patent be denied to or for lands previously to that time located or claimed under the mining laws containing oil or gas solely because of any transfer or assignment thereof or of any interest therein by the original locators to any qualified person prior to the discovery of oil or gas therein. If the claim is in all other respects valid, a patent therefore, not exceeding 160 acres in any one claim, may issue to the holder of it, if the land was not at the time of the inception of development on or under such claim withdrawn from mineral entry.³⁸ A number of cases have risen under these statutes; and it is held that lands of the United States containing oil or gas is subject to location the same as any other mineral land.³⁹ The finding of gas in drilling a well on an oil claim in too small a quantity to be of any commercial value, or to give reasonable evidence of the value of the land for oil, and which was not at the time given any consideration as an inducement of further expenditure for development, is not a "discovery," which gives the locator any vested rights in the property as against the United States.⁴⁰ If the claimant makes no discovery of oil he acquires no rights as against the government or any private individual, except the right to proceed with diligence to effect discovery of oil, and even though in actual possession, in the absence of discovery, and in the absence of diligent prosecution of work leading to discovery, as against the government, at least, he is subject to the possibility of a withdrawal of the

Northern Pacific Ry. v. Walker, 47 Fed. Rep. 681; Schendell v. Rogan, 94 Tex. 585; 63 S. W. Rep. 1001; McShane v. Kenkle, 18 Mont. 208; 44 Pac. Rep. 979; 33 L. R. A. 851.

³⁷ See Appendix.

³⁸ See Sec. 309.

³⁹ Rives v. Gulf Refining Co., 133 La. 178; 62 So. 623.

⁴⁰ United States v. McCutchen, 238 Fed. 575; McLemore v. Express

Oil Co., 158 Cal. 559; 112 Pac. 59; 139 Am. St. 147; Southwestern Oil Co. v. A. & P. R. R. Co., 39 Land Dec. 35; Bay v. Oklahoma, etc., Co., 13 Okl. 425; 73 Pac. 936; New England Oil Co. v. Congdon, 152 Cal. 211; 92 Pac. 180; Borgwardt v. McKittrick, 164 Cal. 650; 130 Pac. 417; Miller v. Christman, 140 Cal. 440, 73 Pac. 1083; 74 Pac. 444; 98 Am. St. 63.

privilege offered him and a consequent termination of his rights.⁴¹ Even if there be a valid location, a subsequent discovery by the locator which will vest him with rights in the property must be such as establishes its character within a statute, and entitles him to a patent on compliance with the other requirements of the statute on the subject of location of mines.⁴²

If the locator leaves his claim without intending to abandon it, he may return at any time prior to the withdrawal of the land from entry by the government, or its entry by another, and proceed to prosecute with diligence his search for mineral, and while so engaged will be protected, both from the government, and from private persons, and if his work is successful, and results in discovery, his right will vest by relation as of the time of his location.⁴³ On an account for damages in a suit in equity by the United States and for the recovery of oil land, defendants, who sunk and operated wells on the land in good faith, under advice of reputable counsel, and where the question of their rights under the law was in great doubt, will not be treated as wilful trespassers.⁴⁴ Neither the exception in the President's order nor the provision of Act June 23, 1910, that the rights of any person who at the date of the order was a *bona fide* occupant or claimant, and was at that date "in diligent prosecution of work leading to a discovery of oil," should not be affected by such order so long as he should "continue in diligent prosecution of said work," apply to save any right in a locator who prior to the date of the order had ceased work for want of funds and never resumed, and where the claim was then resided on by a person placed there for the sole purpose of holding possession. Nor did subsequent work by an assignee of such locator in sinking new wells, commenced while the order was in force and prosecuted to a discovery, give any right to such assignee, the land having previously become subject to the full force and effect of the withdrawal order.⁴⁵ Under the act

⁴¹ United States v. McCutchen, 238 Fed. 575.

⁴² United States v. McCutchen, 238 Fed. 575.

⁴³ United States v. McCutchen, 238 Fed. 575.

⁴⁴ United States v. McCutchen, 238 Fed. 575.

⁴⁵ United States v. McCutchen, 238 Fed. 575.

A claim initiated by a location made while an executive order withdrawing lands from entry was in force, gives no basis for a right as against the United States, as the owner of the title, but the claim-

of Congress of June 25, 1910, where prior to the withdrawal of land from entry, a geologist and mining engineer, as attorney in fact, had located claims thereon after doing some preliminary prospecting, and at the time the order was made defendants had possession of the land under a contract of lease, and were making preparations to drill for oil for commercial purposes, bringing their equipment thereon and holding possession of the land through a caretaker, it was held that where defendants continued in possession, drilled wells, and produced oil in commercial quantities, their rights in the land were not affected by the order of withdrawal, for they had possession while preparing their equipment, and were *bona fide* occupants in diligent prosecution of the work of discovery.⁴⁶ The United States is entitled to maintain a suit in equity to enjoin trespass and waste on public lands occasioned by the extraction and removal of oil therefrom when the oil constitutes the sole value of the lands, and also to obtain relief therein.⁴⁷ But equity has no jurisdic-

ant is a mere trespasser. *United States v. McCutchen*, 234 Fed. 702. See this case for a discussion of the Presidential order of Sept. 27, 1909, withdrawing lands from entry.

The President's order has been held valid in all its phases. *United States v. Mid West Oil Co.*, 236 U. S. 459; 35 Sup. Ct. 309; 57 L. Ed. 673. See where the court denied the right of a litigant to question the validity of this order. *Johnson v. Hinkel* (Cal. App.), 154 Pac. 487.

⁴⁶ This statute is known as the "Pickett Act." *United States v. Grass Creek Oil & Gas Co.*, 236 Fed. 480.

It was also held under the Pickett Act persons in actual occupancy of oil lands, who were erecting equipment to drill wells at the time an order of withdrawal was made, were *bona fide* occupants diligently prosecuting the work of discovery, and so their rights were unaffected by the order of withdrawal. *Ibid.*

The President's proclamation is-

sued after an oil company had entered upon land as a lessee from the occupant and removed the casing from a well, in contravention of the lease, was held not to affect the right of the lessor to recover damages thereby occasioned. *Johnson v. Hinkel* (Cal. App.), 154 Pac. 487.

The President's order of Sept. 27, 1909, temporarily withdrawing certain public land in California from entry did not become inoperative by the Act of June 25, 1910, but continued in force until superseded by order of July 2, 1910; and its effect was to withdraw the lands from exploration as well as entry. *United States v. Midway, etc., Co.*, 232 Fed. 619.

Work necessary to effect a "discovery" of an oil claim cannot be done on a contiguous location claimed by the same person. *Smith v. Union Oil Co. (Cal.)*, 135 Pac. 966.

⁴⁷ *United States v. Midway, etc., Oil Co.*, 232 Fed. 619.

tion of a suit against purchasers in the usual course of business for oil unlawfully extracted from public land; the remedy being at law.⁴⁸ On a bill by the United States, alleging that defendants are in possession of public mineral lands, claiming under entries which are fraudulent and unlawful, and are extracting and selling oil therefrom, the court may properly, on a substantial showing of such facts, appoint a receiver for the property pending final determination of the suit.⁴⁹ One who enters as a trespasser upon public lands, drills wells and extracts and markets oil therefrom is not entitled to the benefit of the rule as to improvements in favor of occupying claimants in good faith under color of title requiring the government to pay for the same.⁵⁰ In order to come within the provisions of the statute protecting a *bona fide* occupant, it is not necessary that he be engaged in actual drilling for oil or gas on a particular tract at the date of withdrawal, or necessarily that work is then being performed upon the identical claim upon which discovery must ultimately be made in order to make a location, and it is enough if reasonable effort is being made at the time, indicating a *bona fide* intention to complete the work of discovery on the particular claim with all practical expedition; such intention being manifested by the doing of physical acts having a direct tendency to facilitate the exploration for and discovery of oil or gas. Thus a company which for months before and at the date of the presidential order withdrawing oil and gas lands from entry was engaged in work necessary and proper in order to effect a discovery of oil, with the then present *bona fide* purpose of completing the work with all reasonable expedition, was diligently prosecuting the work, so as to be within the protection of the statute, though it was delaying the installation of its machinery and the commencement of drilling until it could be assured of its machinery, and the commencement of drilling until it could be assured of a supply of water necessary for the prosecution of the drilling, the land being in a semi-arid region; it was held that it was not required to make any unusual or extraordinary

⁴⁸ *Ibid.*

⁴⁹ United States v. McCutchen,
234 Fed. 702.

⁵⁰ United States v. Midway
Northern Oil Co., 232 F. 619.

As to right of an operator occupying State land in Washington, see State v. Savidge (Wash.), 161

Pac. 470.

effort to obtain water, but only such as was reasonable under the circumstances confronting it. Under such circumstances after discovery of oil, it is too late for the government to question the occupant's rights on the ground that at some time during the progress of the work, subsequent to the presidential order of withdrawal and prior to discovery he was not as diligent as he could have been. The statute does not mean that the occupant's rights shall no longer continue after a discovery is made and the work leading to a discovery ceases, but means that the occupant shall have a right to continue his work to a discovery and the benefits of the discovery as if the land had not been withdrawn.⁵¹ The mere drilling of a well on an adjacent claim is not sufficient, for, while it might disclose the probability of the presence of oil, it in no way would amount to a discovery. Group development or assessment work, authorized by the United States Statutes⁵² in the case of mining claims, is permissible only after discovery; and discovery work, to protect the occupant, cannot be by group. Under the statute, extra territorial work, such as the building of roads and the like, for the benefit of an oil or gas location, or several locations, may constitute the prosecution of work of discovery necessary to protect the rights of claimants and locators after the withdrawal of the land by the President, where such work tends to facilitate discovery.⁵³ If the locator did not act in good faith, anyone claiming under him is in no better

⁵¹ *United States v. North American Oil, Consolidated*, 242 Fed. 723. Citing *McLemore v. Express Co.*, 158 Cal. 559; 112 Pac. 59; 139 Am. St. Rep. 147; *United States v. Grass Creek Oil & Gas Co.*, 236 Fed. 481; 149 C. C. A. 533; *Smelting Co. v. Kemp*, 104 U. S. 636; 26 L. Ed. 875; *United States v. Thirty Two Oil Co.*, 242 Fed. 730; *United States v. Ohio Oil Co.*, 240 Fed. 996; *Cosmos v. Eagle Hill*, 112 Fed. 4; 50 C. C. A. 79; 61 L. R. A. 230; *Miller v. Chrisman*, 140 Cal. 440; 73 Pac. 1083; 74 Pac. 444; 98 Am. St. Rep. 63; *Chrisman v. Miller*, 197 U. S. 313; 25 Sup. Ct. Rep. 468; 49 L. Ed. 770; *Morgwordt v. Me-Kittrick Oil Co.*, 164 Cal. 650;

130 Pac. 417; *Rooney v. Barnette*, 200 Fed. 700; 119 C. C. A. 116; *Mining Co. v. Carpenter*, 4 Nev. 546; 97 Am. Dec. 550.

⁵² Rev. St. Secs. 2324, 2325.

⁵³ *United States v. Thirty Two Oil Co.*, 242 Fed. 730. Citing *United States v. North American Oil Co.*, 242 Fed. 723; *Smith v. Union Oil Co.*, 166 Cal. 217; 135 Pac. 966; *United States v. Stockton Midway Oil Co.*, 240 Fed. 1006; *Anvil Hydraulic & Dr. Co. v. Code*, 182 Fed. 205; 105 C. C. A. 45; *Smelting Co. v. Kempt*, 104 U. S. 636; 26 L. Ed. 875; *Jackson v. Roby*, 109 U. S. 440; 3 Sup. Ct. 301; 27 L. Ed. 990; *United States v. Ohio Oil Co.*, 240 Fed. 996.

condition to assert his claim than the one from whom he derives his rights. The names of others as locators cannot be used by a person in order to obtain more land than the mining laws permit to one locator; and such attempted locations are void; and innocent parties cannot assert that their rights received from such a person or persons shall be protected.⁵⁴ All lands subject to the presidential withdrawal order are subject to the disposition of the land department; and if a first certificate has been issued to a claimant of oil land and the matter is pending in the General Land Office on application for a patent, the final certificate and proceedings in the Land Office cannot be disregarded, and the same questions pending in such office litigated in a suit by the United States to enjoin the claimant from removing oil and to require an accounting for oil already taken. While the final certificate issued to a claimant of oil lands is subject to cancellation by the land department, or to be set aside for fraud by the courts, until cancelled, it vests the entryman with an equitable title to the land and the *prima facie* right to a patent.⁵⁵ An oil placer claim, located on surveyed land by an association of eight persons, pursuant to the United States Statute,^{55a} and covering a quarter section, was held to constitute a single section, and under the Act of February 12, 1903,^{55b} development work done on any one of a group of such claims not exceeding five, lying contiguous and owned by the same person or association, inures to the benefit of all where it tends to their development. The President's proclamation of September 27, 1909, withdrawing certain oil lands from entry provides that "all locations or claims existing and valid on this date may proceed to entry in the usual manner after full investigation and examination," and the Act of June 25, 1910,^{55c} provides that "the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant claimant of oil or gas bearing lands, and who at such date is in the diligent prosecution of work leading to the discovery of oil or gas, shall not be affected or impaired by such order so long as such occupant or claimant shall continue in diligent prosecution of said work." At the time of the withdrawal proclamation one of the defendants to an action brought by the United States to recover both the land and the value of the oil extracted, and to quiet its title, who was the owner of four contiguous quarter section claims, was in possession of the same through his lessee

⁵⁴ United States v. Brookshire Oil Co., 242 Fed. 718. Citing Cook v. Klonos, 164 Fed. 529; 90 C. C. A. 403; Nome & Sinook v. Snyder, 187 Fed. 385; 109 C. C. A. 217; Gird v. California Oil Co., 60 Fed. 531; Hall v. McKinnon, 193 Fed. 572; 113 C. C. A. 440; Duffield v. S. F. Chemical Co., 205 Fed. 480; 123 C. C. A. 548.

⁵⁵ United States v. Record Oil Co., 242 Fed. 746. Citing Dahl v. Raunheim, 132 U. S. 262; 10 Sup. Ct. 74; 33 L. Ed. 324; El Paso Brick Co. v. McKnight, 233 U. S. 257; 34 Sup. Ct. 498; 58 L. Ed. 943; L. R. A. 1915 A, 1113.

^{55a} Rev. Stat. Secs. 2329-2329.

^{55b} 32 Stat. at Large 825.

^{55c} 36 Stat. at Large 847 Sec. 2.

company which was then diligently prosecuting the work of development, and had commenced a well on one claim and expended \$20,000 in preparations for drilling such claim. This work was continued, and oil found in paying quantities. In 1914 the defendant entered and paid for the land, and there was issued to him a final receipt. It was held that the exception in the President's proclamation in favor of existing and valid locations did not apply to claims on which oil had been discovered and to which the claimants therefore had an indefeasable equitable title, but applied to all locations to which the claimants had some valid right; and that the work done inured to the benefit of all of defendant's claims, and that under the facts he had acquired a valid title which could not be questioned by the United States.^{55d}

§ 350. Reservation of oil or gas on stock raising homesteads.

An act of congress of December 29, 1916, permits the entry of land not to exceed 640 acres for stock raising purposes. This is usually land that is not fit for agricultural purposes; and the act is for the purpose of bringing land of that character into market. The statute aims simply to give the stock raiser the use of the surface, and withholds from him "the coal and other mineral deposits in" the land; and the patentee stock raiser takes the land subject to the right of the United States to dispose of such coal and minerals in accordance with the coal and minerals laws in force at the time of the disposal thereof. As oil and gas is classified as a mineral, this statute applies to their production. Any person qualified to locate and enter coal or other mineral deposits, or to mine or remove them under the United States laws, has the right to enter at all times upon the land entered or patented by the stock raiser for the purpose of prospecting for coal or other minerals, but he must not injure or damage the permanent improvements of the stock raiser, entryman or patentee; and he is liable to compensate him for all damages to the crops on the land occasioned by his prospecting. Any person who acquires these mineral deposits on the land from the United States, or the right to mine and remove them, may enter and occupy so much of the surface on the land as may be required for all purposes reasonably incident to the mining or removal of the minerals by securing the written consent or waiver of the homestead entryman or patentee, or upon payment of the damages to the crops or other tangible improvement to the owner under an agreement as to the amount thereof; or in lieu of such an agreement, upon the execution of a good and sufficient bond or undertaking to the United States for the use and benefit of the entryman or the owner of the land, to secure payment of such damages to the crops or tangible im-

^{55d} Consolidated Mutual Oil Co. v. United States, 245 Fed. 521. This case is a thorough discussion of the questions involved.

provements of the entryman or owner, as may be determined and fixed in an action brought thereon in a court of competent jurisdiction against the principal and sureties.⁵⁶ This bond must be executed by the principal and two competent individual sureties or a bonding company which has complied with the requirements of the statute of the United States.⁵⁷ When individual sureties are given affidavit of justification by the sureties and a certificate by the judge or clerk of a court of record, a United States district attorney, commissioners or postmaster as to the identity, signature, and financial competency of the sureties must accompany the bond. This bond, with all accompanying papers, must be filed with the registrar and receiver of the local land office of the district wherein the land is situated. The bond must be in a sum not less than one thousand dollars; and when it is filed with the registrar there must be filed with it evidence of service of a copy of the bond upon the homestead entryman or owner of the land. At the end of thirty days, if no objection be made, this bond will be approved by the registrar and receiver; if objections be filed by the homestead entryman or landowner, then a hearing is had at once, and if a finding is adverse to its sufficiency, the registrar and receiver give notice to the person proffering it, and advise him of his right to appeal to the commissioner of the general land office. If an appeal from an adverse decision be not timely filed, the local officers endorse on the bond "disapproved," and further proceedings are then discontinued. If no objection be made to the bond, or if objections made be overruled and no timely appeal taken by the homestead entryman or owner, the registrar and receiver approve the bond. Mineral applications and coal declaratory statements for applications to purchase coal or other mineral deposits in lands entered or patented under the statute are received and filed at any time after the homestead entry has been received and allowed of record, if the land or coal or mineral deposits therein are not at the time withdrawn or reserved from disposition. In every application for a homestead entry the application must contain a statement to the effect that the entry is made to a reservation of the United States of all coal and other mineral in the land, together with the right to prospect for, mine, and remove the same.

⁵⁶ The form of the bond can be found in the Appendix.

⁵⁷ 28 Stat. At. L. 279 (Aug. 12, 1894), as amended March 23, 1910, 36 Stat. At. L. 241.

CHAPTER XV.

PARTNERSHIPS.

- § 351. Mining partnerships applicable to gas and oil operations.
- § 352. Tenants in common not partners.
- § 353. By agreement a mining association becoming an ordinary partnership.
- § 354. Mining agreements that create ordinary partnerships.
- § 355. Working a mine together creates a mining partnership.
- § 356. Selection of a partner.—Sale of interest.
- § 357. Tenants in common usually do not become partners.
- § 358. Illustration of what makes a mining partnership.
- § 359. Promoters.—Prospectors.
- § 360. Life of mining partnership.—Dissolution.
- § 361. Partition and accounting works a dissolution.
- § 362. Majority control.
- § 363. Power of partner in mining or oil enterprise.
- § 364. Partner's lien.
- § 365. Liability of incoming partner.
- § 366. Each partner liable for all partnership debts.
- § 367. Limited partnerships.
- § 368. Division of royalty.—Damages.
- § 369. Accounting.—Dissolution.

§ 351. Mining partnerships applicable to gas and oil operations.

A mining partnership in many things is radically different from an ordinary partnership. As this kind of a partnership has been expressly held applicable to oil or gas adventures,¹ although, not recognized in Pennsylvania,*¹ it will be necessary in this connection to discuss the rules of law applicable to them generally. In discussing the law with reference to mining partnerships, the subject must be approached, as it were, from two directions: One where joint owners of gas or oil lands operate them in order to extract gas or oil; and, second, where two or more jointly accept a lease of oil lands, or become jointly in-

¹ Childers v. Neeley, 47 W. Va. 70; 34 S. E. Rep. 828; 49 L. R. A. 468; 81 Am. St. 777. borne, 159 Pa. St. 10; 28 Atl. Rep. 163; Dunham v. Loverock, 158 Pa. 179; 27 Atl. 990; 38 Am. St. 838.

*¹ Butler Savings Bank v. Os-

terested in one, and operate the lands leased with a view to extract the gas or oil.

§ 352. Tenants in common not partners.

As between themselves, co-tenants are not partners, whatever they may be to the outside world. A standard authority has made this comparison between co-ownership and co-partnership: "Speaking generally, and excluding all exceptional cases, the principal difference between co-ownership and partnership may be stated as follows: (1) Co-ownership is not necessarily the result of agreement. Partnership is. (2) Co-ownership does not necessarily involve community of profit or loss. Partnership does. (3) One co-owner can, without the consent of the others, transfer his interest to a stranger, so as to put him in the same position as regards the other owners as the transferer himself was before the transfer. A partner cannot do this. (4) One co-owner is not as such the agent real or implied of the others. The partner is. (5) One co-owner has no lien on the thing owned in common for outlays or expenses, nor for what may be due from the others as their share of a common debt. A partner has. (6) One co-owner of land is entitled to have it divided between himself and co-owners, but not to have it sold against their consent. A partner has no right to partition in specie, but is entitled, on a dissolution, to have the partnership property, whether land or not, sold and the proceeds divided. (7) As between the real and personal representatives of a deceased co-owner of freehold land, the equitable as well as the legal interest in his share is real estate; whilst as between the real and personal representatives of a deceased partner the equitable interest in his share of partnership freehold property is treated as personal estate, although the legal interest in it is real estate. (8) Co-ownership not necessarily existing for the sake of gain, and partnership existing for no other purpose, the remedies by way of account and otherwise which one co-owner has against the others, are in many important respects different and less expensive than those which one partner has against his co-partners." ²

² Lindley on Partnership 58.

§ 353. By agreement a mining association becoming an ordinary partnership.

By agreement the owners of a mine or of mining lands, or the owners of a lease of a mine or mining lands, may become partners in the ordinary sense of the term, not only as to themselves but as to strangers. The conduct of the parties may be such as to create such a partnership. Thus where certain mineral land had been held in co-ownership, and large quantities of iron ore had been extracted from the mines upon it; and extensive iron works had been erected by the owners of the land upon it, which were conducted as a trading concern, not only in the product of the mines, but of foreign iron and iron ore, manufactured at the works; it was held that the owners were a trading concern and an ordinary partnership.*² The terms of the agreement may be varied from time to time by the conduct of the parties.³ Such a partnership is governed by the ordinary incidents of a partnership. There is nothing in the mining business to forbid the creation of such a partnership. The confidential relations of an ordinary partnership, exist between the partners; and the withdrawal of one partner dissolves the partnership. The partners are strictly partners; not because of their common ownership of the mine, but as a result of their own agreement.⁴ "Tenants in common," said the Supreme Court of Illinois, "or joint tenants of a mine or quarry may or may not be partners, and the mine or quarry itself may or may not be a part of the common stock. But it is highly inconvenient, if not altogether impossible, for co-owners of a mine or quarry to work it themselves without becoming partners, at least in the profits of the mine; and persons who work a mine or quarry in common are regarded rather as partners in trade than as mere tenants in common of

*² *Crawshay v. Maule*, 1 Swanst 521; 1 Wils. 181; *Bradley v. Harkness*, 26 Cal. 69; *Walker v. Bruce*, 44 Colo. 109; 97 Pac. Rep. 250.

³ *Smith v. Jeyes*, 4 Beav. 503.

⁴ *Decker v. Howell*, 42 Cal. 636; *Stuart v. Adams*, 89 Cal. 367; 26

Pac. Rep. 970; *Lawrence v. Robinson*, 4 Colo. 567; *State National Bank v. Butler*, 149 Ill. 575; 36 N. E. Rep. 1000; *Judge v. Braswell*, 13 Bush. 69; 26 Am. Rep. 185; *Burgan v. Lyell*, 2 Mich. 102; *Jefrey v. Smith*, 1 Jac. and W. 298.

land. The co-owners of mines may be partners, not only in the profits, but also in the mines themselves. The co-owners are then partners to all purposes, and their mutual rights and obligations are determined by the law of partnership as distinct from the law of co-ownership.”⁵

§ 354. Mining agreements that create ordinary partnerships.

If two or more persons agree to engage in a mining adventure, to purchase a mine and share the gains and profits equally, they are ordinary trading partners. In such an instance each exercises his choice in selecting co-partners; and if any one sells out his interest, the partnership is dissolved, the purchaser and remaining partners becoming tenants in common of the mine and its working, subject to the rules applicable to mining partnerships.⁶ A., the owner of a coal mine, entered into an agreement with B. as follows: (1) A. was to have a royalty on every bushel of coal hoisted and sold, to be paid before anything else was paid, at the end of each month; (2) A. to have all control of the mine and the workings connected with it; (3) settlements to be made each month and profits divided or losses to be paid, one-fourth to or by B., the remainder to or by A.; (4) A. was to have an option on B.’s interest, if he desired to sell; (5) if at any time it should be considered by the parties advisable to connect tile works with the mines, the expense of doing so to be in the proportion of one to three, the profits or losses therefrom to be divided on the same basis. As to third parties who gave credit to the firm with notice of the agreement, A. and

⁵ State National Bank v. Butler, 149 Ill. 575; 36 N. E. Rep. 1000; Snyder v. Burnham, 77 Mo. 52; Smith v. Jeyes, 4 Beav. 503; Freeman v. Mememway, 75 Mo. App. 611; Berentz v. Kern King Oil, etc.,

Co., 148 Cal. 577; 84 Pac. Rep. 45, 47.

⁶ Decker v. Howell, 42 Cal. 636; Quinn v. Quinn, 81 Cal. 14; 22 Pac. Rep. 264; Lawrence v. Robinson, 4 Colo. 567.

B. were held to be partners.⁷ Where the owner of a mining right agreed with owner of a mill for the reduction of ores that if the latter would reduce the ores taken out of the mining right, a certain proportion should vest in such mill owner and both should bear the costs of the expense of mining, melting and shipping, each to bear a certain proportion, the profits of the enterprise to be shared between them—it was held that the agreement constituted them partners.⁸

§ 355. Working a mine together creates a mining partnership.

If two or more owners of a mine unite in working it, without any partnership agreement, the act of working it together creates a mining partnership; and the same is true of two or more holding interests in a lease of mining property. "Whatever may be the rights and liabilities" of tenants in common of a mine not being worked, said the Supreme Court of California, "it is clear that when the several owners unite and co-operate in working the mine, then a new relation exists between them, and, to a certain extent, they are governed by the rules relating to partnership. They form what is termed a mining partnership, which is governed by many of the rules relating to ordinary partnerships, but which has also some rules peculiar to itself, one of which is that one person may convey his interest

⁷ *State National Bank v. Butler*, 149 Ill. 575; 36 N. E. Rep. 1000, reversing 48 Ill. App. 648.

⁸ *Ashenfelter v. Williams*, 7 Colo. App. 332; 43 Pac. Rep. 664; *Contra Vietti v. Nesbitt*, 22 Nev. 390; 41 Pac. Rep. 151.

Persons contributing labor, material, and cash to driving an oil well under agreement to incorporate and issue stock in proportion to their contributions, if the well comes in, otherwise each to lose what he puts

in are partners. *Roberts v. McKinney* (Tex. Civ. App.), 187 S. W. 976.

An agreement between two persons whereby each is to have a one-half interest in any mining claims which might thereafter be located by either, or in which either might obtain an interest—each to furnish labor and supplies in perfecting of claims—is not within the statute of frauds. *Doyle v. Burns*, 123 Iowa 488; 99 N. W. Rep. 195.

in a mine and business without dissolving the partnership. Still there may be a partnership in the working of a mine, subject to the rules relating to an ordinary partnership in trade. And this relation may be constituted either by express stipulation or by implication deduced from the acts of the parties. But in case of an ordinary mining partnership, something more will be required to raise the presumption of liability arising from persons holding themselves out to the world as partners, than would be necessary in the case of an ordinary partnership."⁹

§ 356. Selection of a partner.—Sale of interest.

It is a cardinal rule of all ordinary partnerships that one about to engage in a partnership enterprise has the right to select his partners; in such a partnership the *delectus personae* has a part. But such is not the case in a mining partnership. In an ordinary partnership, if a new partner has been introduced, the old partnership is dissolved as to all the partners, where

⁹ Skillman v. Laehman, 23 Cal. 199; Kahn v. Central Smelting Co., 102 U. S. 641; Bissell v. Foss, 114 U. S. 252; 5 Sup. Ct. Rep. 851, affirming 4 Fed. Rep. 694; 2 McCrary 73; Charles v. Eshelman, 5 Colo. 107; Manville v. Parks, 7 Colo. 128; 2 Pac. Rep. 212; Hawkins v. Spokane, etc., Co., 2 Idaho 970; 28 Pac. Rep. 433; Nolan v. Lovelock, 1 Mont. 224; Anaconda, etc., Co. v. Butte, etc., Co., 17 Mont. 519; 43 Pac. Rep. 924; Randall v. Merideth, 76 Tex. 669; 13 S. W. Rep. 576; Wetzel v. Jones, 75 W. Va. 271; 84 S. E. 951.

Plaintiff and defendant obtained a lease of mining property and a bond for its conveyance upon payment of a sum by a certain date,

which was extended for a consideration, each paying half. Under the bond and lease, the parties agreed to work the property jointly, each to bear one-half the expense; defendant putting in his own work and plaintiff furnishing a man to do his share of the work. It was held that the parties were engaged in a joint enterprise for the purpose of carrying out the provisions of the bond and lease, and were equal partners in that respect. Walker v. Bruce, 44 Colo. 109; 97 Pac. 250; Childers v. Neely, 47 W. Va. 70; 34 S. E. 828; 81 Am. St. 777; 49 L. R. A. 468; Blackmarr v. Williamson, 57 W. Va. 249; 50 S. E. 254; Greenlee v. Steelsmith, 64 W.

there is no agreement that it shall be continued.¹⁰ The conveyance of one partner of his interest to a stranger works a dissolution of the partnership. But such is not the case with a mining partnership, for a member of it may convey his interest to a stranger without dissolving the partnership, and the purchaser will become a partner in the enterprise, as much so as his vendor.¹¹ After referring to the case just cited, Justice Field of the Supreme Court of the United States, said: "This case settles two propositions: first, that the members of a mining association have no right to object to the admission of a stranger into the association who buys the share of one of the associates; and, second, that the sale and assignment by one of the associates of his interest does not dissolve the mining partnership. It follows from these propositions, that one member of a mining partnership has the right, without consulting his associates, to sell his interest in the partnership to a stranger, and that such a sale injures no right of property of the other associates. Much less does a purchase by one associate of the share of another inflict any wrong upon the other members of the partnership. There is no relation of trust or confidence between mining members which is violated by the sale and assignment by one partner to a stranger, or to one of the associates of his share in the property of the association."¹² Therefore, the death of one of the partners does not dissolve the partnership; his heirs suc-

Va. 353; 62 S. E. 459; *Bartlett v. Boyles*, 66 W. Va. 327; 66 S. E. 474.

The law with reference to mining partnerships has been codified in some States, as in California. Civil Code 1885. Secs. 2511-2520; Idaho, Rev. Stat. Secs. 3301-3309; Montana. Civil Code 1895, Secs. 3350-3359.

¹⁰ *Heath v. Sanson*, 2 B. and Ad. 291; *Morss v. Gleason*, 64 N. Y. 204.

¹¹ *Kahn v. Central Smelting Co.*, 102 U. S. 641; *Childers v. Neely*,

47 W. Va. 70; 34 S. E. 628; 81 Am. St. 777; 49 L. R. A. 468. § 909.

¹² *Bissell v. Foss*, 114 U. S. 252, 5 Sup. Ct. Rep. 851, affirming 4 Fed. Rep. 694; 2 *McCrary* 73; *Santa Clara, etc., Assn. v. Quicksilver Mining Co.*, 17 Fed. Rep. 657; *Settembre v. Putnam*, 30 Cal. 490; *McConnell v. Denver*, 35 Cal. 365; *Jones v. Clark*, 42 Cal. 180; *Smith v. Cooley*, 65 Cal. 46; 2 *Pac. Rep.* 880; *Chung Kee v. Davidson*, 102 Cal. 188; 36 *Pac. Rep.* 519; *Higgins v. Armstrong*, 9 Colo. 38; 10 *Pac. Rep.* 232.

ceeding to his rights and place the same as a vendee of the interest, although they take no part in the management of partnership affairs, and do not hold themselves out as partners.¹³

§ 357. Tenants in common usually do not become partners.

There is no presumption where tenants in common work mines or mining territory together (and the same is true of oil territory) that they have created an ordinary co-partnership, either by their acts or by an agreement. If the course of dealings among co-tenants is naturally referable to the relation already existing among them, they, in the working of the mine or development of the mining territory, will be considered as co-tenants rather than partners.¹⁴ Thus where two joint owners of a lease of oil lands agree to carry on operations upon such land, each contributing a proportionate share of the expenses, they are not only between themselves not partners, but are not so as to third parties. They are simply working their own shares, responsible for their own acts, and are not subject to the laws of partnership.¹⁵ In the distribution of proceeds of an oil or mining adventure in the hands of a receiver, derived from an oil lease in the hands of tenants in common, they will be deemed such tenants, and no preference will be given creditors of the enterprise over individual creditors of either tenant, unless there was a partnership in fact, or by holding out.¹⁶ And

¹³ Taylor v. Castle, 42 Cal. 367; Nisbet v. Nash, 52 Cal. 540; Clark v. Ritter, 59 Cal. 669; Charles v. Eshleman, 5 Colo. 107.

¹⁴ Dunham v. Loverock, 158 Pa. St. 197; 27 Atl. Rep. 990. See Walker v. Tupper, 152 Pa. St. 1; 25 Atl. Rep. 172; Brown v. Jaquette, 94 Pa. St. 113; Neill v. Shamburg, 158 Pa. St. 263; 27 Atl. Rep. 992; Taylor v. Fried, 161 Pa. St. 53; 28 Atl. Rep. 993. See Childers v. Nee-

ley, 47 W. Va. 70; 34 S. E. Rep. 828; 49 L. R. A. 468.

¹⁵ Butler Savings Bank v. Osborne, 159 Pa. St. 10; 28 Atl. Rep. 163; Dunham v. Loverock, 158 Pa. St. 197; 27 Atl. Rep. 990; Johnson v. Price, 172 Pa. 427; 33 Atl. 688. It should be observed that in Pennsylvania such a thing as a "mining partnership" is unknown.

¹⁶ Meridian National Bank v. McComica, 8 Ohio Cir. Ct. Rep. 442.

where coal lands descended, one-third to the widow and two-thirds to children of the deceased, and the latter entered on the premises and worked the mines thereon until nearly exhausted, it was held that the widow could not hold the children liable to her as partners or trespassers, they at no time having excluded her from the premises; but could hold them as co-tenants.¹⁷ Where leases were taken in the individual names of the several lessees, it was said that "if the parties by parol associated themselves as partners, for the purpose of developing and operating it for the production of oil, it might thereby be converted into partnership assets, for the payment of partnership debts."¹⁸

§ 358. Illustration of what makes a mining partnership.

A. owned a tract of undeveloped coal land. He agreed with B. and C. that they might prospect for coal until they struck a particular seam, they two doing all the work, and to have two-thirds of the claim. After the seam was struck, the three, jointly, were to prosecute the work, A. paying one and B. and C. two-thirds of the expenses. It was held that this was a mining partnership; and did not create the relation of landlord and tenant.¹⁹ The proprietors of ditches in mining districts are tenants in common of real estate, and the rights in the ditch and in the profits arising from the sales of water are governed by the law of tenancy in common.²⁰ Two persons, being the owner of a two-thirds interest in a mine, verbally agreed with the plaintiff that they would furnish the tools and provisions and he should explore and develop the mine; and if it should prove valuable, they would give him an equal share of their interest. This was held to make a mining partnership.²¹ "The working of a mine under a bare mining right has been uniformly considered by courts of equity as a species of trade. Hence the legal relations existing between two or more persons interested

¹⁷ McGowan v. Bailey, 179 Pa. St. 470; 36 Atl. Rep. 325.

¹⁸ Brown v. Beecher, 120 Pa. St. 590; 15 Atl. Rep. 608. See Patrick v. Weston, 22 Colo. 45; 43 Pac. Rep. 446.

¹⁹ Henderson v. Allen, 23 Cal. 519.

²⁰ Bradley v. Harkness, 26 Cal. 69; McConnell v. Denver, 35 Cal. 365.

²¹ Settembre v. Putnam, 30 Cal. 490.

in such a right is that of a qualified partnership, and the remedies relating to a mining partnership are available for the assertion or violation of any right arising out of it.”²² A prospector and a hotel keeper agreed in writing “to share equal in any mine which we may buy or find from this date. I, B., offset my time against my board with M.” It was held that this made them tenants in common of any mine bought at their common expense, or discovered and located pending this written agreement, and while it was performed by M. M. having failed, he went out of the hotel business, and did not and could not board B. It was also held that he was not entitled to any interest in mines purchased by B. with his own individual money.²³ A contract to work a mine, pay one-half of the expenses, and receive one-half of the product for the labor, does not make a mining partnership; it is simply a contract for services.²⁴ So where A. agreed with B. that if the latter would go to a certain county and produce a paying quartz mine, A. would pay his expenses and big wages, and if the mine proved to be a paying one, would give him, in addition, an interest in it, this was also held to be a mere contract of hiring and not a mining partnership.²⁵ Merely agreeing to work a mine together constitutes those thus agreeing merely mining partners, whether they own the mine²⁶ or only a right to work it.²⁷ So an association of persons merely for the purpose of operating mines and smelting works at a certain place is merely a mining partnership.²⁸ An agreement by four persons to secure a lease to a certain mining property, to work it jointly, each to have a one-fourth interest, and to share the expenses and profits equally, constitutes a mining partnership, and is not dissolved by the sale of his share by one of their number.²⁹ So the same is true if they jointly employ a manager to run the mine and account

²² *Smith v. Cooley*, 65 Cal. 46; 2 Pac. Rep. 880.

²³ *Miller v. Butterfield*, 79 Cal. 62; 21 Pac. Rep. 543.

²⁴ *Stuart v. Adams*, 89 Cal. 367; 26 Pac. Rep. 970.

²⁵ *Berry v. Woodburn*, 107 Cal. 604; 40 Pac. Rep. 802.

²⁶ *Charles v. Eshleman*, 5 Colo. 107; *Nolan v. Lovelock*, 1 Mont. 224.

²⁷ *Manville v. Parks*, 7 Colo. 128; 2 Pac. Rep. 212; *Harris v. Lloyd*, 11 Mont. 390; 28 Pac. Rep. 736.

²⁸ *Higgins v. Armstrong*, 9 Colo. 38; 10 Pac. Rep. 232.

²⁹ *Meagher v. Reed*, 14 Colo. 335; 24 Pac. Rep. 681; 9 L. R. A. 455.

to them for the proceeds of it.³⁰ So where one individual owned seven-eighths of a mine and another the remaining eighth, and the latter worked the mine, practically excluding the former, except inviting him to take part as a worker simply; it was held that they constituted a mining partnership under a statute providing that "those owning a majority of the shares or interests in a mining partnership have the right to control its methods of working," and that the former was entitled to an injunction restraining the latter from working the mine, except as he should direct.³¹ Where a statute provided if two or more persons should own or acquire a mining claim for the purpose of working it and extracting the ore therefrom; and if they should actually engage in working the mine, the transaction should constitute a mining partnership; it was held that where one individual owned three-fourths and another one-fourth interest in a mining claim, and the latter had alone worked the mine, that there was no mining partnership created.³² So taking a mortgage on a mine and the mining tools, the mortgagor to remain in possession, and at the time of each "clean up" the proceeds to be applied to pay the running expenses and the mortgage debt, will not make a mining partnership.³³ An agreement between two tenants in common of an oil lease to drill an additional well on the leased premises at the common cost of the co-tenants, will not, as between themselves, create a partnership.^{32a}

§ 359. Promoters.—Prospectors.

Promoters are not partners:³⁴ nor, generally, are provisional subscribers to a proposed partnership.³⁵ Nor are pros-

³⁰ *Slater v. Haas*, 15 Colo. 574; 25 Pac. Rep. 1089; *Lyman v. Schwartz*, 13 Colo. App. 318; 57 Pac. Rep. 735.

³¹ *Hawkins v. Spokane, etc., Co.*, 2 Idaho 970; 28 Pac. Rep. 433; *Hawkins v. Spokane, etc., Co.*, 3 Idaho 650; 3 Pac. Rep. 40.

³² *Anaconda, etc., Co. v. Butte, etc., Co.*, 17 Mont. 519; 43 Pac. Rep. 924.

³³ *Chungkee v. Davidson*, 102 Cal. 188; 36 Pac. Rep. 519.

^{32a} *Dunham v. Loverock*, 158 Pa. 197; 27 Atl. 990; 38 Am. St. 838.

"No presumption of partnership arises from the operation of an oil well by tenants in common." *Neill v. Shamburg*, 158 Pa. 263; 27 Atl. 992.

³⁴ *Douglas v. Muskett*, 4 Moo. and P. 750; 7 Bing. 110; 9 L. J. (os) C. P. 35; *Atwood v. Small*, 7 B. and C. 390; *Higgins v. Hopkins*, 3 Exch. 163; 18 L. J. Exch. 113; 6 Ry. Cas. 75; *Wilson v. Holden* (otherwise *Bailey v. Haines*), 15 Q. B. 533; 19 L. J. Q. B. 73; 14 Jur. 835; *Sylvester v. McCuaig*, 28 Up. Can. C. P. 443.

³⁵ *Dickinson v. Valpy*, 10 B. and

pectors, joining in a joint enterprise strictly partners; and their transactions are not governed by the law of strict partnership.³⁶

§ 360. Life of mining partnership.—Dissolution.

A mining partnership will continue for the length of time agreed upon, or so long as the parties act together as a partnership. If no limit is fixed in the articles of agreement, it is determinable, under equitable restrictions, at pleasure; but the determination cannot defeat rights accrued under it while it was in force.³⁷ So if the partnership sell or otherwise dispose of all its property it is by the act of sale or disposition dissolved.³⁸ Thus where a co-partnership was formed to drill a gas well and supply its members with gas; and at the request of the defendant it disposed of its gas well to a third party, and the defendant agreed to furnish gas to its members at certain schedule prices, it was held that the sale of the property of the co-partnership worked the dissolution thereof, and that the individual members had not such a community of interest as to entitle them to sue jointly or as partners for the breach of the contract.³⁹ Quarrels and dissensions among the members of a partnership to an extent which prevents the harmonious working of the joint enterprise, is good ground for the dissolution of the partnership; and pending the action for a dissolution a receiver should be appointed for the partnership; for the court cannot put one partner or set of partners in possession to the exclusion of the other partner or set of partners.⁴⁰ In an action for a dissolution of a mining partnership the court will presume that all the partners have an equal share;⁴¹ and if it appear that one

C. 128; 5 M. and Ry. 126; 8 L. J. (os) B. B. 51; Fox v. Frith, 10 M. & W. 131; Car and M. 502; 11 L. J. Exch. 336.

³⁶ Boucher v. Mulverhill, 1 Mont. 306.

Agreement is writing whereby railroad was to furnish money, drilling apparatus, etc., and other party was to furnish labor in prospecting for oil, gas, etc., held not a partnership making the railroad liable for labor performed, but a grubstake contract. Mattocks v. Gibbons (Wash.), 162 P. 19.

³⁷ Lawrence v. Robinson, 4 Colo. 567.

³⁸ Wells v. Ellis, 68 Cal. 243; 9 Pac. Rep. 80; Blaker v. Sands, 29 Kan. 551; Wilson v. Davis, 1 Mont. 183; Thompson v. Bowman, 6 Wall 316; Kennedy v. Porter, 109 N. Y. 526; 17 N. E. Rep. 426; Theriot v. Michel, 28 La. Ann. 107.

³⁹ Pennville, etc., Co. v. Thomas, 21 Ind. App. 1; 51 N. E. Rep. 351.

⁴⁰ Childers v. Neeley, 47 W. Va. 70; 34 S. E. Rep. 828; 49 L. R. A. 468; 81 Am. St. 777.

⁴¹ Clark v. Brown, 83 Cal. 181; 23 Pac. Rep. 289.

partner disposed of his interest it will be presumed that the purchase became a member of the partnership, and was as much so as his vendor.⁴²

§ 361. Partition and accounting works a dissolution.

A member of a mining partnership can not have a partition of the mining property without a dissolution of the partnership; nor can he have an accounting without the same result.⁴³

§ 362. Majority control.

In a mining partnership the majority in interest in the property control the enterprise, and may bind the property by contracts within the legitimate scope of the business; and all the partners will be bound by their acts.⁴⁴ Such would not be the case, however, if the object of the partnership was perverted and a business entered upon not within its legitimate scope.⁴⁵ The majority in interest, however, are not empowered to sell, without his consent, a co-partner's interest in the enterprise.^{45a}

§ 363. Power of partner in mining or oil enterprise.

Partnerships, whether mining partnerships or ordinary partnerships, are not commercial or trading partnerships; and one partner does not have the power to bind the partnership that he would have if they were commercial or trading partnerships.⁴⁶ He cannot bind the partnership except upon such contracts as are usual and necessary in the ordinary prosecution of the work, unless expressly authorized.⁴⁷ There is no presumption that he can bind the firm by the execution of a promissory note; and to render such an instrument binding on the firm, his power to bind it must be shown. This is true even though he be the man-

⁴² Taylor v. Castle, 42 Cal. 367; Nisbet v. Nash, 52 Cal. 540; Blackmarr v. Williamson, 57 W. Va. 249; 50 S. E. 254; Greenlee v. Steel-smith, 64 W. Va. 353; 62 S. E. 459. Of course no such a presumption would prevail with respect to an ordinary partnership.

⁴³ Nisbet v. Nash, 52 Cal. 540; Clark v. Ritter, 59 Cal. 669; Hall v. Vernon, 47 W. Va. 295; 34 S. E. 764; Preston v. White, 57 W. Va. 278; 50 S. E. 236.

⁴⁴ Dougherty v. Creary, 30 Cal. 290; 89 Am. Dec. 116; Nolan v.

Lovelock, 1 Mont. 224; Childers v. Neeley, 47 W. Va. 70; 34 S. E. Rep. 828; 49 L. R. A. 468; 81 Am. St. 777; Hawkins v. Spokane, etc., Co., 2 Idaho 970; 28 Pac. Rep. 433. § 909.

⁴⁵ Childers v. Neeley, *supra*; Blackmarr v. Williamson, 57 W. Va. 249; 50 S. E. 254; Bartlett v. Boyles, 66 W. Va. 327; 66 S. E. 474.

^{45a} Edinger v. Southern Oil Co., 69 W. Va. 34; 71 S. E. 266.

⁴⁶ Jones v. Clark, 42 Cal. 180.

⁴⁷ Jones v. Clark, *supra*. § 909.

aging partner or agent of the firm.⁴⁸ But if a partner gives a promissory note for money loaned the partnership, the person loaning may usually recover for the amount loaned from the partnership, if he can show that it was used for the legitimate purposes of the partnership; but the cause of action is not based upon the note — the action is for money paid to the partnership use, and only so much can be recovered as was used by the partnership, at least this is true for the purpose of reimbursing the partner out of the partnership assets who signed the note and had it to pay.⁴⁹ One partner cannot borrow money upon the faith of the partnership credit, even upon the most urgent occasions,⁵⁰ unless expressly authorized so to do, or such is the usage;⁵¹ and such authority must be more than inferential — it must be specific.⁵² Money borrowed by a partner without authority, and accepted and used by the partnership, or used without any specific act of acceptance, may be recovered from such partnership.⁵³ But one partner has power to bind the corporation by buying materials to be used in its legitimate business, such as tools, fuses, powder, and the like, or in selling its products. So the superintendent of a mine may purchase such articles as are necessary for the conduct of the mine in the usual

⁴⁸ *Skillman v. Lachman*, 23 Cal. 199; *Dickinson v. Valpy*, 10 B. and C. 128; *Brown v. Kidger*, 3 H. and N. 853; *Jones v. Clark*, 42 Cal. 180; *Decker v. Howell*, 42 Cal. 636; *Charles v. Eshelman*, 5 Colo. 107; *Manville v. Parks*, 7 Colo. 128; 2 Pac. Rep. 212; *Higgins v. Armstrong*, 9 Colo. 38; 10 Pac. Rep. 232; *Judge v. Braswell*, 13 Bush. 69; 26 Am. Rep. 185; *Shaw v. McGregory*, 105 Mass. 96 (a quarrying firm); *Pooley v. Whitmore*, 10 Heisk. 629; 27 Am. Rep. 733; *Green-slade v. Dower*, 7 B. and C. 635; 1 M. and Ry. 640; 6 L. J. (os) K. B. 155.

⁴⁹ *Brown v. Kidger*, 3 H. and N. 853; 28 L. J. Exch. 66; *in re Ger-*

man Mining Co., 4 D. G. M. and G. 19; 24 L. J. Ch. 41; 18 Jur. 710; 23 L. T. (os) 200; 2 W. R. 543.

⁵⁰ *Hawtayne v. Bourne*, 7 M. and W. 595; 10 L. J. (N. S.) Exch. 224; 5 Jur. 118; *Sims v. Brittain*, 4 B. and A. 375; 2 N. and M. 594; *Randall v. Merideth*, 76 Tex. 669; 13 S. W. Rep. 576.

⁵¹ *Ricketts v. Bennett*, 4 C. B. 686; 17 L. J. (N. S.) C. P. 17; 11 Jur. 1062.

⁵² *Burmester v. Norris*, 21 L. J. (N. S.) Exch. 43; 6 Exch. 796; 17 L. T. 232; *Randall v. Merideth*, 76 Tex. 669; 13 S. W. Rep. 576.

⁵³ *Tredwen v. Bourne*, 6 M. and W. 461; 9 L. J. (N. S.) Exch. 290; 4 Jur. 747.

manner, without express authority.⁵⁴ But one partner cannot bind his partnership by the employment of an attorney to protect the mine's interest,⁵⁵ unless, perhaps, in a case of emergency where he had no time to consult his partners. Yet one partner may bind his firm by agreeing to pay for labor in the partnership enterprise,⁵⁶ unless there is an express agreement between the partners that he should have no such power and of which the employed person had due notice at the time of the employment.⁵⁷ The power to bind the partnership by a purchase does not extend so far as to authorize a partner of a firm engaged in operating coal lands to purchase additional coal lands; for it cannot be said that such power falls within the scope of the partnership business.⁵⁸ Mining partnerships, in the strict meaning of the term, except so far as is the general usage of persons engaged in similar pursuits, or the particular company has established a different rule, are governed by the law of ordinary partnerships.⁵⁹ These rules are applicable to oil or gas partnerships formed for the purpose of developing oil or gas lands or operating gas or oil wells.⁶⁰

⁵⁴ *Stuart v. Adams*, 89 Cal. 367; 26 Pac. Rep. 970; *Roberts v. Eberhart*, 1 Kay. 148; 23 L. J. Ch. 201; 22 L. T. 253; 2 W. R. 125.

⁵⁵ *Charles v. Eshelman*, 5 Colo. 107.

⁵⁶ *Burgan v. Lyell*, 2 Mich. 102; 55 Am. Dec. 53; *Potter v. Moses*, 1 R. I. 430; *Nolan v. Lovelock*, 1 Mont. 224.

⁵⁷ *Nolan v. Lovelock*, 1 Mont. 224.

⁵⁸ *Judge v. Braswell*, 13 Bush. 69; 26 Am. Rep. 185. Nor to the development of a mine to which he did not assent. *Chase v. Savage*, etc., Co., 2 Nev. 9.

⁵⁹ *Jones v. Clark*, 42 Cal. 180.

⁶⁰ *Childers v. Neeley*, 47 W. Va. 76; 34 S. E. Rep. 828; 49 L. R. A. 468; 81 Am. St. 777. Same points noted above are made in this case. See also *Ervin v. Masterman*,

16 Ohio Cir. Ct. Rep. 62; 8 Ohio Dec. 516; *Baker v. Brennan*, 12 Ohio C. D. 211; 22 Ohio C. C. 241.

Several persons entered into a written agreement to sink a gas well, each to pay a certain sum which was stated in the agreement. One of their number was authorized to let the contract for the well, which he did. The funds thus subscribed were exhausted in the work, and no gas found. Some of the subscribers increased their subscriptions, and the well sunk deeper, but no gas found. It was held that those who did increase their subscriptions were not liable beyond the amount of such subscriptions. *Clark v. Rumsey*, 59 N. Y. App. Div. 435; 69 N. Y. Supp. 102; 52 N. Y. Supp. 417.

§ 364. Partner's lien.

A partner, whether he be a member of a mining partnership⁶¹ or an ordinary partnership, who advances more than his share of money to operate or develop the mine, or the gas or oil lands, has a lien on his partner's share to the extent of his over-advance-ment, on final accounting.⁶² And where the partners are assignees of a lease, the same rule prevails, although the assignment be void, because not recorded according to the requirements of a statute.⁶³ Tenants in common have a like lien.⁶⁴ Even though a note be given individually for the partnership indebtedness, the lien is not lost.⁶⁵ If the partnership property be divided, the partner's lien is lost. And this was held true where the oil pumped was run into tanks of a pipe line company, and separate certificates of the amount of each partner was given him by the pipe line company, as per agreement; for in that instance the pipe line company was simply the agent of the partners to make the division.⁶⁶ So if a joint certificate of the amount received be issued, and one of the partners sell his share in it, he will lose his lien, especially if there is an agreement each may dispose of his share.⁶⁷ Where two partners excluded their fellow partner and leased the mine, it was held that the latter had a lien on the ore mined by the lessee for his share, although not on ore mined before the lessee acquired possession of the mine.⁶⁸

⁶¹ *Morganstern v. Thrift*, 66 Cal. 577; 6 Pac. Rep. 689.

⁶² *Ervin v. Masterman*, 16 Ohio Cir. Ct. Rep. 62; 8 Ohio Dec. 516; *Childers v. Neeley*, 47 W. Va. 70; 34 S. E. Rep. 828; 49 L. R. A. 468; 81 Am. St. 777; *Burdon v. Barkas*, 3 Gill. 412; 31 L. J. Ch. 521; 8 Jur. (N. S.) 130; 5 L. T. 573; *Duryea v. Burt*, 28 Cal. 569. § 909, note 62.

Mining partners, operating oil leases, have a lien on the social property for advances or balances due them after payment of debts; but, having divided the product of the business by giving to each his share of the product in severalty and separating it from the balance, no lien exists on the product thus

divided, but the lien remains valid on the social property used in operating the said leaseholds. *Greenlee v. Steelsmith*, 64 W. Va. 353; 62 S. E. 459; *Bartlett v. Boyles*, 66 W. Va. 327; 66 S. E. 474; *Kirchner v. Smith*, 61 W. Va. 434; 58 S. E. 614; *Childers v. Neeley*, 47 W. Va. 70; 34 S. E. 628; 81 Am. St. 777; 49 L. R. A. 468.

⁶³ *Ervin v. Masterman*, *supra*.

⁶⁴ *Ervin v. Masterman*, *supra*.

⁶⁵ *Brown v. Beecher*, 120 Pa. St. 590; 15 Atl. Rep. 608.

⁶⁶ *Childers v. Neeley*, *supra*.

⁶⁷ *Ervin v. Masterman*, *supra*.

⁶⁸ *G. V. B. Mine Co. v. First National Bank*, 95 Fed. Rep. 23; 36 C. C. A. 633.

§ 365. Liability of incoming partner.

An incoming partner in an ordinary partnership is not personally liable for the debts of the partnership created before his connection with it; unless he agreed to be bound for them.⁶⁹ But a purchaser of a partner's share in a mining partnership takes it subject to the remaining partner's lien for moneys advanced, unless he is a purchaser in good faith, without notice, and for a valuable consideration. It will be presumed he had notice of the lien at the time he made the purchase; because the existence of the partnership puts him on notice.⁷⁰ And such new purchaser is liable for the debts of a mining partnership before he became a member; for his admission to the firm did not dissolve the firm, it continuing the same as it was before,—he simply taking his vendor's place.⁷¹ His liability is for the entire amount of the indebtedness.⁷²

§ 366. Each partner liable for all partnership debts.

In a mining partnership, a partner is liable the same as in an ordinary partnership — each partner is personally liable for the entire indebtedness of the firm.⁷³

§ 367. Limited partnerships.

Statutes have been enacted providing for limited partnerships, which are made applicable to mining adventures. It does

⁶⁹ Patrick v. Weston, 22 Colo. 45; 43 Pac. Rep. 446; Shireff v. Wilks, 1 East. 48; Babcock v. Stewart, 58 Pa. St. 179; Wright v. Brosseau, 73 Ill. 381; Waller v. Davis, 59 Ia. 103; 12 N. W. Rep. 798; Guild v. Belcher 119 Mass. 257; Fagan v. Long, 30 Mo. 222; Brown v. Beecher, 120 Pa. St. 590; 15 Atl. Rep. 608.

The retiring partner will continue to be liable for the old debts, the same as if he had not retired.

⁷⁰ Duryea v. Burt, 28 Cal. 569.

⁷¹ Jones v. Clark, 42 Cal. 180;

Contra, Patrick v. Weston, 22 Colo. 45; 43 Pac. Rep. 446.

⁷² Stuart v. Adams, 89 Cal. 367; 26 Pac. Rep. 970.

⁷³ Stuart v. Adams, 89 Cal. 367; 26 Pac. Rep. 970; Childers v. Neeley, 47 W. Va. 70; 34 S. E. 828; 81 Am. St. 777; 49 L. R. A. 468; Kirehner v. Smith, 61 W. Va. 436; 58 S. E. 614; Jones v. Clark, 42 Cal. 425; Taylor v. Castle, 42 Cal. 367; Settembre v. Putnam, 42 Cal. 490; Decker v. Howell, 42 Cal. 636; Duryea v. Burt, 28 Cal. 569.

not fall within the scope of this volume to discuss the law relating to limited partnerships, and therefore no farther notice will be taken of such statutes or decisions relating to them.⁷⁴

§ 368. Division of royalty.—Damages.

Several co-tenants of an oil lease assigned it to an operator who was to deliver to them a part of the product; but one of the joint owners did not join in the assignment, and notified the assignee not to deliver any oil to his co-tenants. It was held that the non-joining owner was not entitled to his share of the oil without proving that his co-tenants had received more than their share; that if he choose to affirm it, he must take his share with the others upon a distribution of the royalty after deducting all proper charges and expenses; and that if he did not affirm the lease, he had no claim to any share in the royalty, and could only look to the lessee as a co-tenant who had not acquired his title.⁷⁵ A tenant in common who has tortiously been deprived by the fraud of his co-tenant of his interest in an oil lease may bring suit for his share of the oil produced and converted by such co-tenant while in possession. He may recover as damages the value of the oil in the tank, without deduction for the expenses of production.⁷⁶

⁷⁴ Pennsylvania Act of June 2, 1874, P. L. 271; English Acts, 25 and 26 Vict. c. 89; 30 and 31 Vict. c. 131; 33 and 34 Vict. c. 104; 40 and 41 Vict. c. 26; 42 and 43 Vict. c. 76, 43 Vict. c. 19; 46 and 47 Vict. c. 30; 49 Vict. c. 23; 53 and 54 Vict. cc. 62, 63, 64; 56 and 57 Vict. c. 58; and 61 and 62 Vict. c. 26. See *Carter v. Producers, etc., Oil Co.*, 164 Pa. St. 463; 30 Atl. Rep. 391; *Ferguson v. Wilson*, L. R. 2 Ch. App. 77; 15 W. R. 27; *Hunt's case*, 37 L. J. Ch. 278; 16 W. R. 472; *Weston's case*, L. R. 4 Ch. App. 20; 38 L. J. Ch. 49; 19 L. T.

337; 17 W. R. 62; *Gilbert's case*, L. R. 5 Ch. App. 559; 18 W. R. 938; *Lumsden's case*, L. R. 4 Ch. App. 31; 17 W. R. 65; *Cumming v. Prescott*, 2 Y and C. Exch. 488; *Snell's case*, L. R. 5 Ch. App. 22; *Poole v. Middleton*, 29 Beav. 646; 9 Jur. (N. S.) 1262; 4 L. T. 631; 9 W. R. 758; *Nation's case*, L. R. 3 Eq. 77; 36 L. J. Ch. 112; 15 L. T. 308; 15 W. R. 143.

⁷⁵ *Enterprise Oil & Gas Co. v. Natural Transit Co.*, 172 Pa. 421; 38 Atl. 687.

⁷⁶ *Foster v. Weaver*, 118 Pa. 42, 12 Atl. 313.

§ 369. Accounting.—Dissolution.

If the members of a mining partnership are discordant and at ill will, and the partnership hopeless of prosperity, a court of equity, upon a bill filed for that purpose, will dissolve the partnership, appoint a receiver for the property, and not leave the assets in the possession and control of one member of the partnership, to the exclusion of others. In such an instance it will decree an accounting between the partners. But a court of equity will not decree an accounting between the partners of a mining partnership without a dissolution.⁷⁷ But where one tenant had kept the accounts pertaining to the lease, had purchased the supplies, paid the bills and furnished his co-tenant statements from time to time, deducting such co-partner's proportion of the expense, it was held that such co-tenant could maintain a bill in equity for an accounting against such tenant.⁷⁸ If the partners cannot agree, the majority may conduct the mining operations; and if they do they will be liable in accounting only for culpable negligence or breach of duty, or wrongful conduct, or diversion of the property from the business of the partnership. On decreeing a dissolution, it is error on a partial settlement for the court to give a personal judgment against one partner in favor of another for a balance found due him on such partial settlement. The social property must first be reduced to money and applied to discharge partnership liabilities, including any balance found due on final settlement from one partner to another, and then a decree over on final settlement for any balance that may remain. If one member has advanced money or property to pay the share of another in the operating expenses, he is entitled to interest thereon, as against the delinquent partner on dissolution and final settlement and winding up of the partnership.⁷⁹

⁷⁷ Childers v. Neeley, 47 W. Va. 70; 34 S. E. 628; 81 Am St. 777; 40 L. R. A. 468.

⁷⁸ Harrington Bros. v. Florence Oil Co., 178 Pa. 444; 35 Atl. 855.

⁷⁹ Bartlett v. Boyles, 66 W. Va. 327; 66 S. E. 474.

Rules stated for accounting.

Edinger v. Southern Oil Co., 34 W. Va. 69; 71 S. E. 266.

CHAPTER XVI.

MECHANIC'S LIENS.

- § 370. Lubricating oil.
- § 371. Labor or material must be furnished under a contract.
- § 372. For what material furnished a lien may be obtained.
- § 373. For what labor a lien may be obtained.
- § 374. Overseer, custodian or superintendent entitled to a lien.
- § 375. Upon what interest in land lien may be acquired.
- § 376. Oil or gas leased premises.
- § 377. Lien on oil well.
- § 378. Forfeiture of lease.
- § 379. Retroactive effect.
- § 380. Priority of liens.
- § 381. Notice of claim of lien.—Description of land.
- § 382. Assignment of claims.
- § 383. On plant of public gas company.
- § 384. Oil refinery.—Paraffine works.

§ 370. Lubricating oil.

Oil furnished with which to oil machinery used in a mine or manufactory does not enhance the value of the mine or manufactory, nor add any value to it; so that a person furnishing oil of that kind cannot obtain a lien by virtue of the terms of a statute giving lien for material furnished such structures.¹

§ 371. Labor or material must be furnished under a contract.

The foundation of the right to secure a lien for labor performed or material furnished must be a contract with the owner of the land upon which the lien is sought to be enforced; and if there does not exist such a contract, express or implied, the person claiming it must fail.² A contract with one not the owner

¹ Standard Oil Co. v. Lane, 75 Wis. 636; 44 N. W. Rep. 644; 7 L. R. A. 191; The Princess, 185 Fed. 218.

² Jurgenson v. Diller, 114 Cal. 491; 46 Pac. Rep. 610; Wilkins v. Abell, 26 Colo. 462; 58 Pac. Rep. 612; Davidson v. Jennings, 27 Colo.

or his agent does not bind the land or the improvements upon it; not entitle a laborer to a lien for work done for a person he did not know to be the owner, and not to be working the mine as a representative of the owner.³ So a laborer employed by the owner's husband and another, who was not the wife's agent, and upon the assurance of the wife that her husband wanted the mine worked, and he would see that he was paid, is not entitled to a lien as against the wife under a statute giving a laborer a lien for work done on real estate under a contract with the owner of it.⁴ So a laborer working on a mine for one who has ousted the true owner can acquire no lien.⁵ Where the owner of a mine entered into a contract with an operator to operate the mine and make certain improvements on it, with the privilege of buying it, a certain percentage of the proceeds to be paid him, and to be credited on the purchase price in case the operator purchased the mine; and if he did not pay, the improvements and payments to be forfeited, which was in fact done and the mine turned back; it was held that the operator was the "agent" of the owner, and persons working for him or furnishing him materials for use in the mine were entitled to a lien.⁶ The amount to be paid for services need not be definitely agreed upon, if there is an agreement to pay.⁷

187; 60 Pac. Rep. 354; 48 L. R. A. 340; Rico, etc., Co. v. Musgrave, 14 Colo. 79; 23 Pac. Rep. 458; Murtland v. Callihan, 2 Pa. Super. Ct. Rep. 340; 38 W. N. C. 512; Littler v. Robinson, 38 Ind. App. 104; 77 N. E. Rep. 1145; Windfall Natural Gas, etc., Co. v. Roe, 42 Ind. App. 278; 84 N. E. Rep. 996. It must be shown, it is held in the last case, that the person employing the plaintiff had authority from the owner of the land authorizing him to employ such plaintiff.

³Jurgenson v. Diller, 114 Cal. 491; 46 Pac. Rep. 410; Windfall Natural Gas, etc., Co. v. Roe, 42 Ind. App. 278; 84 N. E. Rep. 996; Nerentz v. Kerr, etc., Oil Co. (Cal.), 84 Pac. Rep. 45, 47; Littler v. Robinson, 38 Ind. App. 104; 77 N. E. Rep. 1145.

⁴Folsom v. Cragen, 11 Colo. 205; 17 Pac. Rep. 515.

⁵Idaho Gold Mining Co. v. Win-

chell, 6 Idaho 729; 59 Pac. Rep. 533.

⁶Eaman v. Bashford, 4 Ariz. 199; 37 Pac. Rep. 24. See a similar case where the operator was considered to be the tenant, and therefore no lien accrued. Jordan v. Myers, 126 Cal. 565; 58 Pac. Rep. 1061; Block v. Murray, 12 Mont. 545; 31 Pac. Rep. 550. But see Maher v. Shull, 11 Colo. App. 322; 52 Pac. Rep. 1115, where a lien was enforced; and so Hines v. Miller, 122 Cal. 517; 55 Pac. Rep. 401. None enforced in Skym v. Weske, etc., Co., 5 Cal. Unrep. Cas. 551; 47 Pac. Rep. 110.

⁷Bewich v. Muir, 83 Cal. 373; 23 Pac. Rep. 390.

A *co-tenant* in an oil lease who furnishes labor and material for the drilling of wells and development under a contract whereby his co-tenant is to pay a pro rata share of the cost is not entitled to a lien under the Oklahoma Rev. Laws,

§ 372. For what material furnished a lien may be obtained.

Under the California statute the material furnished must be used on the mine to entitle the material man to a lien for its value.⁸ So the vendor of machinery for boring wells to a contractor sinking such wells is not entitled to a lien on the well he bores for such machinery's price, the machinery not being intended to become a part of the well, and in fact not becoming so.⁹ But one furnishing pipe for an oil well is entitled to a lien;¹⁰ and so one furnishing material for an oil tank.¹¹ One furnishing cars to be used in a coal mine is entitled to a lien under a statute giving anyone a lien furnishing "any material, fixtures, engine, boilers, or machinery for any building or improvement on land." "A going coal mine is not merely a hole in the ground. It is made up of shafts, drifts, slopes, engines, machinery, platforms, cars, tracks, scales, etc., and taken as a thing, if not a building, it is unquestionably an improvement, and an improvement on land."¹²

So a lien may be had for tools furnished to be used in a mine in California;¹⁴ or for materials furnished to build a dwelling house on the claim,¹⁵ even though built, in case of a shop, upon land contiguous to the mine if for the use of such mine, and a part of the mining company's property. The shop may be sold with the mine for the purpose of enforcing the lien.¹⁶ Where a statute gives a lien on a mine for "timbers or other material to be used in the mine" furnished by a material man, a lien may be taken for powder, steel, and candles furnished to be used in

1910, Sec. 3865, on the undivided share of his co-tenant. *Uncle Sam Oil Co. v. Richards* (Okla.), 158 Pac. 1187.

Laborers in Texas drilling an oil well with the machinery of the oil company have no lien on the machinery. *Barton v. Wichita River Oil Co.* (Tex. Civ. App.), 187 S. W. 1043.

⁸ *Bewick v. Muir*, 83 Cal. 373; 23 Pac. Rep. 390; *Hamilton v. Delhi*, etc., Co., 118 Cal. 148; 50 Pac. Rep. 378.

⁹ *Jareki Mfg. Co. v. Struther*, 8 Ohio Cir. Dec. 5; 14 Ohio C. C. 400.

¹⁰ *Devine v. Taylor*, 12 Ohio Cir. Ct. Rep. 723; 4 Ohio Cir. Ct. Dec. 248; 1 Ohio Dec. 153; *Blaskell v.*

Gallagher, 20 Ind. App. 224; 50 N. E. Rep. 485; 67 Am. St. Rep. 250.

¹¹ *Parker Land & Oil Co. v. Reddick*, 18 Ind. App. 616; 47 N. E. Rep. 848.

¹² *Central Trust Co. v. Sheffield*, etc., Co., 42 Fed. Rep. 106.

¹⁴ *Malone v. Big Flat*, etc., Co., 76 Cal. 578; 18 Pac. Rep. 772. A pump fastened to works furnish a good claim for a lien. *Goss v. Helbing*, 77 Cal. 190; 19 Pac. Rep. 277.

¹⁵ *Dickenson v. Bolyer*, 55 Cal. 285.

¹⁶ *Keystone Mining Co. v. Gallagher*, 5 Colo. 23. Lumber furnished for an oil refinery. *Short v. Miller*, 120 Pa. St. 470; 14 Atl. Rep. 374.

it.¹⁷ But a boiler, pump, engine, and machinery not situated in or in any way connected with the improvement, or a coal mine lease, used only for the purpose of drawing up coal and water, will not fasten a lien on the mine.¹⁸ One furnishing natural gas to run an engine used in drilling an oil well is such a material man as gives him a lien for it as furnished;¹⁹ but a statute providing for a lien for materials furnished for any structure, will not authorize a lien on the interest of a lessee under an oil lease for coal furnished the lessee's contractor and used by him in drilling a well on the leased premises.^{19a}

§ 373. For what labor a lien may be obtained.

Aside from the question who or what employee is entitled to a lien, and not discussing the right to a lien by an overseer, a superintendent, a manager or foreman, we will discuss in this section what services will entitle an employee or servant to a lien for labor rendered; premising our discussion by the remark that local statutes wholly govern the right. One working upon a house situated on a mining claim has been held entitled to a lien on the whole mine.²⁰ So upon a shop.²¹ A statute providing that "all persons performing labor for carrying on any mill shall have a lien on such mill for such work or labor," gives a teamster a lien who hauls quartz to a quartz mill.²² One working on an oil tank, having a capacity of two or three hundred

¹⁷ *Keystone Mining Co. v. Gallagher*, *supra*.

¹⁸ *Meistrell v. Reach*, 56 Mo. App. 243.

¹⁹ *Haskel v. Gallagher*, 20 Ind. App. 224; 50 N. E. Rep. 485; 67 Am. St. Rep. 250.

^{19a} *Niagara Oil Co. v. McBee*, 45 Ind. App. 576; 91 N. E. Rep. 250.

A statute gave a lien for materials used in improving or equipping a house with any fixtures for supplying gas or electric light; but it was repealed by a subsequent statute which gave a lien for material furnished for the improvement of real property, and the word "improvement" was defined so as to include the erection, alteration or repair of any structure on, connected with, or beneath the surface of any real property, or materials

furnished for its permanent improvement. It was held that no lien could be acquired for gas and electric fixtures furnished for a house because they did not constitute an improvement of real property, they not being permanently affixed to the building, but were merely for the temporary use of the occupant, subject to removal by him. *Caldwell v. Glazier*, 138 N. Y. App. Div. 826; 123 N. Y. Supp. 622.

²⁰ *Dickenson v. Bolyer*, 55 Cal. 285. See *Hamilton v. Delhi Mining Co.*, 118 Cal. 148; 50 Pac. Rep. 378.

²¹ *Keystone Mining Co. v. Gallagher*, 5 Colo. 23; *Meistrell v. Reach*, 56 Mo. App. 243.

²² *In re Hope Mining Co.*, 1 Sawy. 710.

barrels, placed on a foundation built expressly for it, out of earth and lumber on the land of the person ordering it, is entitled to a lien under the general mechanic's lien law giving a lien upon any structure built upon the land, such oil tank being a fixture.²³ A statute giving a lien for work performed in making shafts, drifts, etc., for a mine does not give a lien for work performed in building a wagon road.²⁴ A blacksmith sharpening tools and drills and making pipes, and other necessary and like work on a mine, is entitled to a lien on the mine; for such tools and machinery used in developing a mine are to be considered, while so used, as affixed to it under the Code of California.²⁵ In California a contractor for the labor of others in a mine at a fixed rate for each man per day is entitled to a lien for their labor.²⁶ One hauling pipe to be used in an oil well is entitled to a lien.²⁷ But a statute giving a lien upon all tools, machinery and stock located in or about a mill or shop, to all labors employed in and about it, in case of insolvency, will not give a lien upon a boiler, engine, shafting, beam, derrick, reel, ropes and drill, when put in place and action, but not connected with any mill or shop.²⁸ One employed as a watchman and to collect accounts is not entitled to a lien under the Oklahoma statutes.^{28a}

§ 374. Overseer, custodian or superintendent entitled to a lien.

Under the statute providing that "every person performing labor" for a mining company doing business in the State shall be entitled to a lien on all its property, taking precedence over all other debts or judgments against the company, an overseer and custodian of the mine and property of such a company is entitled to a lien for his services.²⁹ So it has been held that a superintendent of a mine rendering service in planning and

²³ Parker Land & Oil Co. v. Reddick, 18 Ind. App. 616; 47 N. E. Rep. 848; Standard Oil Co. v. Sowden, 55 Ohio St. 332; 45 N. E. Rep. 320; 36 Wkly. L. Bull. 306; 37 Wkly. L. Bull. 3; *Contra* Seiders, etc., Works v. Lewis, etc., Co., 7 Pa. Dist. Rep. 278; 21 Pa. Co. Ct. Rep. 80.

²⁴ Williams v. Toledo Coal Co., 25 Ore. 426; 36 Pac. Rep. 159.

²⁵ Malone v. Big Flat, etc., 76 Cal. 578; 18 Pac. Rep. 772.

²⁶ Malone v. Big Flat Gravel Co., 76 Cal. 578; 18 Pac. Rep. 772.

²⁷ McElwaine v. Hosey, 135 Ind. 481; 35 N. E. Rep. 272.

²⁸ *Ibid.*

^{28a} Hunt v. Stubling (Okl.), 157 Pac. 740.

²⁹ McLaren v. Byrens, 80 Mich. 275; 45 N. W. Rep. 143.

superintending development of mines, and in planning and superintending the erection of a mill and machinery for them, performed work and labor in or upon the property of a mining company, such as entitled him to a lien for his services, but not for services in keeping books and disbursing funds.³⁰ Of a foreman it is said: "He certainly did work in the mine, though not with his hands, and it is clear that the direct tendency of his work was to develop the property. We think the foreman of work in the mine is as fully secured by the law as the miners who work under his directions."³¹ Of a similar instance the Supreme Court of the United States said: "He was not the general agent of the mining business of the plaintiff in error. That office was filled by Patrick. He was not a contractor. The services rendered by him were not of a professional character, such as those of a mining engineer. He was the overseer and foreman of the body of miners who performed the manual labor upon the mines. He planned and personally superintended and directed the work, with a view to develop the mine and make it a successful venture. He appears from the findings, to have performed services similar to those required of the foreman of a gang of track hands upon a railroad, or a force of mechanics engaged in building a house. Such duties are very different from those which belong to the general superintendent of a railroad, or the contractor for erecting a house. Their performance may well be called work and labor; they require the personal attention and supervision of the foreman; and occasionally in an emergency, as, for example, it becomes necessary for him to assist with his own hands. Such duties cannot be performed without much physical exertion, which, while not so severe as that demanded of the workmen under the control of the foreman, is nevertheless really work and labor. Bodily toil, as well as some skill and knowledge in directing the work, is required for their successful per-

³⁰ *Rara Avis' Gold & Silver Mining Co. v. Bouscher*, 9 Colo. 385; 12 Pac. Rep. 433; *Palmer v. Uncas Mining Co.*, 70 Cal. 614; 11 Pac. Rep. 666.

A mere watchman upon an idle oil claim cannot successfully claim a lien; but for services rendered in pumping oil he can, under a statute providing that any person

who performs labor in a mining claim, or upon real property worked as a mine, either in its development or in working it by subtraction process, has a lien upon the land. *Donaldson v. Orchard Crude Oil Co.*, 6 Cal. App. 641; 92 Pac. Rep. 1046.

³¹ *Capron v. Strout*, 11 Nev. 304.

formance. We think that the discharge of such duties may well be called work and labor, and that the District Court rightfully declared the person who performed them entitled to a lien, under the law of the Territory."³² So the superintendent of the construction of a gas pipe line, having full supervision of the digging of the trenches, the laying of gas pipes, etc., with full authority to hire and discharge employees, being required to walk along the pipe lines, test the wells, which required him to handle wrenches and tools for short periods of time, was held entitled to a lien under a statute giving "laborers and employees" liens on the property of an insolvent corporation.³³ On the other hand it has been held that a general manager and superintendent of a mine who does not perform bodily toil is not entitled to a lien upon it under a statute giving a lien to one "who performs labor in any mining claim."³⁴

§ 375. Upon what interest in land a lien may be acquired.

In Indiana the lien attaches only to the interest the person against whom it is sought to enforce has in the land. This is made so by the express words of the statute. It may be enforced against the lessee's interest, when the work is performed for him; but does not bind the lessor's interest.³⁵ In Missouri a laborer for a mere licensee, to operate on land, does not get a lien on the land.³⁶ In Montana the employee on a leasehold cannot acquire a lien against the mining property.³⁷ In Iowa he can;³⁸ so in Pennsylvania,³⁹ and in Ohio.⁴⁰

³² Flagstaff, etc., Co v. Cullins, 104 U. S. 176, affirming Cullins v. Flagstaff, etc., Co., 2 Utah 219; Stryker v. Cassidy, 76 N. Y. 50.

³³ Pendergast v. Yandes, 124 Ind. 159; 24 N. E. Rep. 724.

³⁴ Boyle v. Mountain, etc., Co., 9 N. M. 237; 50 Pac. Rep. 347. Same result. Smallhouse v. Kentucky, etc., Co., 2 Mont. 443.

³⁵ Hopkins v. Hudson, 107 Ind. 191; 8 N. E. Rep. 91; St. Clair Coal Co. v. Martz, 75 Pa. St. 384; United Mines Co. v. Hatcher, 79 Fed. Rep. 517; 25 C. C. A. 46.

³⁶ Springfield Foundry, etc., Co. v. Cole, 130 Mo. 1; 31 S. W. Rep. 922, reversing 57 Mo. App. 11. So in Oregon. Stinson v. Hardy, 27

Ore. 584; 41 Pac. Rep. 116; formerly so in Colorado; Wilkins v. Abell, 26 Colo. 462; 58 Pac. Rep. 612; Little Valeria, etc., Co. v. Ingersoll, 14 Colo. App. 240; 59 Pac. Rep. 970; Schweizer v. Mansfield, 14 Colo. App. 236; 59 Pac. Rep. 843.

³⁷ Pelton v. Minah, etc., Co., 11 Mont. 281; 28 Pac. Rep. 310; Block v. Murray, 12 Mont. 545; 31 Pac. Rep. 550.

³⁸ Mitchell v. Burwell, 110 Ia. 10; 81 N. W. Rep. 193.

³⁹ McElwaine v. Brown (Pa.), 11 Atl. Rep. 453; Thomas v. Smith, 42 Pa. St. 68.

⁴⁰ Acklin v. Woltermeier, 19 Ohio C. C. Rep. 372; 10 Ohio C. D. 629.

In the case of a mine, a lien does not attach to the interest of the lessee if no minerals be found.⁴¹

§ 376. Oil or gas leased premises.

In order to secure a lien on the premises for which material is furnished or upon which labor is performed, it is necessary that the person purchasing the material or employing the laborer should be the owner or have some interest in the land against which it is sought to enforce the lien.^{41a} This rule is applicable to oil and gas leases or options. The usual so-called lease or option merely gives the person taking it the right to explore on the land for oil or gas, or both; and until he finds either one or the other he has no interest in such land, and consequently no mechanic's lien can attach thereto or be enforced against it. Nor can a lien be enforced against the well casing or tubing nor against any of the personal property used by the lessee on the land.^{41b} If the lessee find oil or gas, then his so-called lease has ripened into an interest in the land, and to that interest the lien may attach. But here the terms of the contract between the landowner and the so-called lessee must be carefully scrutinized; for its terms may be such as to give him a present interest therein regardless of the fact whether or not the land is developed, and when that is the case, such interest may be subjected to the lien.^{41c}

§ 377. Lien on oil well.

In Indiana a statute provided that "all persons performing labor or furnishing material or machinery for erecting, alter-

⁴¹ *Blindert v. Kreiser*, 81 Wis. 174; 51 N. W. Rep. 324; *Colvin v. Weimer*, 64 Minn. 37; 65 N. W. Rep. 1079.

If the person purchasing the material or employing the plaintiff (aside from the question of agency) had no interest in the land, a lien cannot be enforced against it. *Littler v. Robinson*, 38 Ind. App. 104; 77 N. E. Rep. 1145 (defective complaint); *Windfall Natural Gas Co. v. Roe*, 42 Ind. App. 278; 84 N. E. Rep. 996; *Brentz v. Kerr Oil, etc.*, Co. (Cal. App.), 84 Pac. Rep. 45, 47

(complaint failed to show authority to develop the mine).

^{41a} Of course purchases and employment through an authorized agent is the same as purchases and employment by the landowner or principal.

^{41b} *Eastern Oil Co. v. McEvoy*, 75 Kan. 515; 89 Pac. Rep. 1048. See also *Littler v. Robinson*, 38 Ind. App. 104; 77 N. E. Rep. 1145.

^{41c} *Blindert v. Kreiser*, 81 Wis. 174; 51 N. W. Rep. 324; *Colvin v. Weimer*, 64 Minn. 37; 65 N. W. Rep. 1079.

ing, repairing, or removing any house, mill, manufactory, or other building, reservoir, system of waterworks, or other structure," might have a mechanic's lien. It was held that this statute gave a lien for work performed in drilling an oil well, and for natural gas furnished the contractor as fuel with which to run the engine by which power was supplied for drilling the well. It was considered that the oil well, boilers, engine, shafting, beam, derrick, reel, ropes and drill when put in place and action, in drilling a gas well, constituted a "structure" within the meaning of the statute. "If such appliances for making a gas well be a structure, it would seem that a completed oil well with all its appliances, including the drilled hole in the earth, with its tubing, should also be regarded as within the meaning to which the language of the statute may legitimately be expanded in the application by the courts."⁴²

§ 378. Forfeiture of lease.

A lien for work and labor in putting up a structure for a lessee on his lease, to be used in the operation of a gas and oil well, is not impaired by the forfeiture of the lease, where the lien attaches prior to the forfeiture, nor by the failure of the lessee to drill a well in accordance with the terms of the lease, where a statute provides that "where the owner has only a leasehold interest, or the land is incumbered by mortgage, the lien so far as concerns the buildings erected by said lien holder is not impaired by forfeiture of the lease for rent or foreclosure of mortgage; but the same may be sold to satisfy the lien and removal within" a certain specified number of days after the sale.⁴³

⁴² *Haskell v. Gallagher*, 20 Ind. App. 224; 50 N. E. Rep. 485; 67 Am. St. Rep. 250; *McElwaine v. Hosey*, 135 Ind. 481; 35 N. E. Rep. 272; *Hoppes v. Baie*, 105 Ia. 648; 75 N. W. Rep. 495 (a water well). *Contra*, *Omaha, etc., Co. v. Burns*, 49 Neb. 229; 68 N. W. Rep. 492; *Vandergrift's Appeal*, 83 Pa. St. 126; *Devine v. Taylor*, 12 Ohio Cir. Ct. Rep. 723; 1 Ohio Dec. 153; 4 Ohio Cir. Ct. Dec. 248. See *Acklin*

v. Waltermier, 19 Ohio C. C. Rep. 372; 10 Ohio C. D. 629. Doubtless in *Orth v. West & East Oil Co.*, 159 Pa. St. 388; 28 Atl. Rep. 180. In drilling a well to find minerals, and no minerals were found, it was held that no lien attached to the lessee's interest. *Colvin v. Weimer*, 64 Minn. 37; 65 N. W. Rep. 1079.

⁴³ *Montpelier, etc., Co. v. Stephenson*, 22 Ind. App. 175; 53 N. E. Rep. 444. Unless the statute gives

§379. Retroactive effect.

A law giving a lien will not be so construed as to give a retroactive effect. Thus where a statute did not give a lien against a leasehold interest in the land, but was so amended as to give a lien to laborers working for the lessee against the lessor's interest in the land, it was held that the statute as amended did not apply to work performed before it was amended.⁴⁴

§ 380. Priority of liens.

Statutes giving mechanics and laborers liens often provide that no lien on a structure shall have preference, when the several holders contributed to the same results and their labors all contributed to it. In Ohio a statute provided that where several persons obtained liens on the same "job," they should have no priority among each other. It was held that the construction of an oil well was a "job," and all lien-holders thereon were on an equality.⁴⁵ In Michigan a miner's lien accrues as the labor is performed; and where labor has been performed before the levy of a writ of attachment, the laborer is entitled to priority over it, although he did not file his notice of a claim until after the levy.⁴⁶ But a mortgage recorded before the contract for labor has been made takes precedence of the labor's lien.⁴⁷ A statute may provide that a labor's or material man's

a lienholder the right to sell and remove the fixtures he places upon the leased premises, he cannot do so, and his only remedy is against the premises and fixtures or real estate. *Chicago Smokeless Fuel Gas Co. v. Lyman*, 62 Ill. App. 538.

But in Kansas a lien cannot be acquired on the personal property of the lessee if he fails to find oil or gas. *Eastern Ohio Oil Co. v. McEvoy*, 75 Kan. 515; 89 Pac. Rep. 1048.

⁴⁴ *United Mines Co. v. Hatcher*, 79 Fed. Rep. 517; 25 C. C. A. 46; *Gardner v. Resumption, etc., Co.*, 4 Colo. App. 271; 35 Pac. Rep. 674; *Hunter v. Savage, etc., Co.*, 4 Nev. 153.

⁴⁵ *Devine v. Taylor*, 12 Ohio Cir. Ct. Rep. 723; 4 Ohio Cir. Ct. Dec. 248; 1 Ohio Dec. 153.

⁴⁶ *McLaren v. Byrnes*, 80 Mich. 275; 45 N. W. Rep. 143; *Peatman v. Centerville, etc., Co.*, 105 Ia. 1; 74 N. W. Rep. 689 (a judgment); *Standard Oil Co. v. Sowden*, 55 Ohio St. 332; 45 N. E. Rep. 320 (a mortgage); *Sicardi v. Keystone Oil Co.*, 149 Pa. St. 639; 24 Atl. Rep. 163; *Trust v. Miami Oil Co.*, 10 Ohio C. D. 372; 19 Ohio C. C. Rep. 727.

⁴⁷ *Folsom v. Cragen*, 11 Colo. 205; 17 Pac. Rep. 515; *Rawlins v. New Memphis, etc., Co.*, 105 Tenn. 268; 60 S. W. Rep. 206.

lien shall take precedence of a prior recorded mortgage.⁴⁸ The lien attaches when the work is commenced or the material furnished.⁴⁹

§ 381. Notice of claim of lien — description of land.

The notice of the lien, or of an intention to claim one, must so describe the property upon which the lien is claimed as to identify it, or the lien will be void.⁵⁰ An incorrect description of metes and bounds will render the notice invalid.⁵¹ The precise words of the statute need not be followed; substantially equivalent expressions will suffice.⁵² Where a statute required among other things, "the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed," to be stated, a failure to insert in the claim a statement by whom the claimant was employed renders it fatally defective.⁵³ But a statement that the claimant was employed by the defendant company without naming the company's agent, is sufficient.⁵⁴ Where a statute requires "a statement of the terms, time given, and conditions of the labor contract, and also a description of the property to be charged with the lien sufficient for identification," to be inserted in the claim, if there is set forth in the claim the kind and number of days of labor performed, the dates between which it was performed, with the aggregate sum then due, and "that the terms of payment for said labor were cash, as soon as said labor was performed," and a description of the property by name and the district, where it is well known, that will be sufficient.⁵⁵ Under the statute just referred to as against the interest of one who enters and operates

⁴⁸ Warren v. Sohn, 112 Ind. 213; 13 N. E. Rep. 863.

⁴⁹ Bristol, etc., Co. v. Bristol, etc., Co., 99 Tenn. 371; 42 S. W. Rep. 19.

⁵⁰ Fernandez v. Burleson, 110 Cal. 164; 42 Pac. Rep. 566; Rico, etc., Co. v. Musgrave, 14 Colo. 79; 23 Pac. Rep. 458; Tredinnick v. Red Cloud, etc., Co., 72 Cal. 78; 13 Pac. Rep. 152.

⁵¹ Fernandez v. Burleson, *supra*.

⁵² Ascha v. Fitch (Cal.), 46 Pac. Rep. 298; Bewick v. Muir, 83 Cal. 373; 23 Pac. Rep. 390.

⁵³ Ascha v. Fitch, *supra*.

⁵⁴ Malone v. Big Flat Gravel Co., 76 Cal. 578; 18 Pac. Rep. 772.

⁵⁵ Tredinnick v. Red Cloud, etc., Co., 72 Cal. 78; 13 Pac. Rep. 152.

several claims as one mine, they may be treated as a single claim, and declared upon as such.⁵⁶

§ 382. Assignment of claims.

A claim, secured by a mechanic's lien, may be assigned; and the assignment will carry the lien so that the assignee can enforce it.⁵⁷ And if the statute provide for a penalty and attorney's fees, the assignee may also recover these.⁵⁸

§ 383. On plant of public gas company.

A lien may be acquired on the plant of a gas company furnishing gas to a municipality for work and materials furnished as readily as upon an entirely private concern. And the fact that the public might be inconvenienced is not a bar to the enforcement of the lien.⁵⁹ The entire plant of the company is subject to the lien, including pipes laid in the streets of the municipality and on the interest of the company in the premises.⁶⁰ By special agreement, one furnishing machinery for a gas plant may retain a lien on the machinery he furnishes, for its price, after it is affixed to the company's premises.⁶¹ And even where it is held that a lien cannot be acquired upon the

⁵⁶ *Hamilton v. Delhi Mining Co.*, 118 Cal. 148; 50 Pac. Rep. 378.

⁵⁷ *Malone v. Big Flat Gravel Co.*, 76 Cal. 578; 18 Pac. Rep. 772.

⁵⁸ *Mitchell v. Burwell*, 110 Ia. 10; 81 N. W. Rep. 193.

⁵⁹ *Wood v. Holly Mfg. Co.*, 100 Ala. 660; 13 So. Rep. 948; *Badger Lumber Co. v. Marion, etc., Co.*, 48 Kan. 187; 30 Pac. Rep. 117; affirming 29 Pac. Rep. 476; *Oconto Water Co. v. National Foundry*, 59 Fed. Rep. 19; 7 C. C. A. 603; *National Foundry Co. v. Oconto Water Co.*, 52 Fed. Rep. 43; *Steger v. Artic Refrigerator Co.*, 89 Tenn. 453; 14 So. Rep. 1087; 11 L. R. A. 580.

⁶⁰ *National Foundry v. Oconto*

Water Co., 52 Fed. Rep. 43; *Oconto Water Co. v. National Foundry*, 59 Fed. Rep. 19; 7 C. C. A. 603; *Bristol Goodson, etc., Co. v. Bristol, etc., Co.*, 99 Tenn. 371; 42 S. W. Rep. 19; *Rawlings v. New Memphis, etc., Co.*, 105 Tenn. 268; 60 S. W. Rep. 206; *Goss v. Helbing*, 77 Cal. 190; 19 Pac. Rep. 277; *Light Co. v. Gill*, 14 Pa. Co. Ct. Rep. 6; *McNeal, etc., Co. v. Howland*, 111 N. C. 615; 16 S. E. Rep. 857; 20 L. R. A. 743. But see *Eufaula Water Co. v. Addystone Water Co.*, 89 Ala. 522; 8 So. Rep. 25.

⁶¹ *Wood v. Holly Mf. Co.*, 100 Ala. 326; 13 So. Rep. 948.

premises of a gas company supplying a city with gas, a lien may be retained on machinery sold conditionally to the gas company.⁶² Where a lien cannot be obtained on the plant itself, because of the fact that the company has no interest in the premises sufficient for a lien, and a statute gives the person furnishing machinery a lien on such machinery and the right to remove it, yet he cannot acquire a lien on the pipes in the street connected with the plant, they not being subject to a lien; for the plant is an integer, and cannot be separated under a lien.⁶³ Yet when a company was conducting a plant for a city, and gave a trust deed on the machinery to the vendor of it, providing that the machinery should not be considered as fixtures until it was paid for; it was held that public necessity required the plant and the company's franchise, where it was in the hands of a receiver, to be sold together, and that the trust deed should be a specific lien thereon to the extent of the value of the machinery.⁶⁴

§ 384. Oil refinery—Paraffine works.

An oil refinery is a building, within the meaning of that term as used in a statute; and a lien may be secured upon it by a material man furnishing timbers for it.⁶⁵ And although the several structures constituting the refinery consist of appliances put up in the open air, and are not enclosed under a roof or shed, yet a material man's lien for furnishing material for any one of such appliances extends to the whole refinery.⁶⁶ Paraffine works are part of a refinery.⁶⁷

⁶² *Holly Mf. Co. v. New Chester Water Co.*, 48 Fed. Rep. 879.

⁶³ *Oeonto Water Co. v. National Foundry*, 59 Fed. Rep. 19; 7 C. C. A. 603.

⁶⁴ *McNeal Pipe, etc., Co. v. Woltman*, 114 N. C. 178; 19 S. E. Rep. 109.

⁶⁵ *Short v. Miller*, 120 Pa. St. 470; 14 Atl. Rep. 374.

⁶⁶ *Titusville Iron Works v. Keystone Oil Co.*, 130 Pa. St. 211; 18 Atl. Rep. 739; *Linden Steel Co. v. Imperial Refining Co.*, 138 Pa. St. 10; 20 Atl. Rep. 867, 869.

⁶⁷ *Sicardi v. Keystone Oil Co.*, 149 Pa. St. 139; 24 Atl. Rep. 161, 163.

CHAPTER XVII.

MORTGAGES.

Art. 1. Mortgage of oil or mining property.

Art. 2. Mortgage of gas plant.

ARTICLE 1.

MORTGAGE OF OIL OR MINING PROPERTY.

§ 385. Leasehold may be mortgaged by lessee.

§ 386. Lessor may mortgage premises.

§ 387. Mortgage of oil or mining lease in Pennsylvania.

§ 388. Mortgagor may remove gas, oil and minerals.

§ 389. Mortgagor in possession.

§ 390. Mortgagee in possession.

§ 391. Mortgagee in possession, English rule.

§ 385. Leasehold may be mortgaged by lessee.

A leasehold estate may be mortgaged, even though it be an estate only for years;¹ and the same is true of a lease to take out mineral, gas or oil; for such a lease gives a freehold interest in the land.² The mortgage must be recorded, according to the registry laws of the State where the lands leased lie; and if recording is necessary to the validity of an ordinary mortgage, then a mortgage of a leasehold estate must be recorded.³ The mortgagee is entitled to the benefit of any covenants in a lease, as for a renewal; and if there be a renewal, his mortgage at-

¹ Walton v. Cronly, 14 Wend. 63;

Astor v. Miller, 2 Paige Ch. 68;

Astor v. Hoyt, 5 Wend. 603; Childs

v. Clark, 3 Barb. Ch. 52; Broman

v. Young, 35 Hun 173.

² Heller v. Dailey, 28 Ind. App.

555; 63 N. E. Rep. 490.

³ Lester v. Hardesty, 29 Md. 50.

taches to the renewed lease.⁴ Where the royalties on coal and iron mined on the premises were to be paid before the coal or iron was removed from the premises, it was held that the lessee was entitled to be paid before the mortgagee of the lessee, out of the funds of the lessee's agents arising from a sale of coal and iron and paid into court. The lessee was treated as a mortgagor in possession who was entitled to the rents and profits as against the mortgagee.⁵ In Ohio it has been held that a real estate mortgage, given by the lessee, will not bind the leasehold or the lessee's interest, because such a leasehold is not real estate or an interest in the freehold; and the question was left open whether a chattel mortgage would bind it.⁶ The same was also held in New York.⁷

§ 386. Lessor may mortgage premises.

A lessor may mortgage the premises leased, but the mortgage will be subject to the terms of the lease, aside from the question of accepting a mortgage without notice of such lease. The mortgagee has only the rights of the mortgagor as against the lessee, his assignee or sublessee.⁸ Until default in the provisions of the mortgage, at least, the mortgagor, if in possession, is entitled to the rents and profits due under the lease, and the mortgage is not a lien upon them.⁹ It makes no difference whether the mortgage was executed before or after the date of the lease; payment to the mortgagor is good until the mortgagee interferes.¹⁰ Where the law of the State is that the mortgageo

⁴ *Slee v. Manhattan Co.*, 1 Paige Ch. 48.

⁵ *Childs v. Hurd*, 32 W. Va. 66; 9 S. E. Rep. 362.

⁶ *Meridian, etc., Bank v. McConica*, 8 Ohio Cir. Ct. Rep. 442; 4 Ohio Dec. 106.

⁷ *Broman v. Young*, 35 Hun 173; *First National Bank v. Dow*, 41 Hun 13.

⁸ *Hemphill v. Giles*, 66 N. C. 512.

⁹ *Bank of Ogdensburgh v. Arnold*, 5 Paige Ch. 38; *Fitchburg, etc., Corp. v. Melven*, 15 Mass. 268; *Long v. Wade*, 70 Me. 358; *Clarke v. Curtis*, 1 Gratt. 289; *McKirker v. Hawley*, 16 Johns. 289.

¹⁰ *Trent v. Hunt*, 9 Exch. 14, 22; *Edwards v. Woodbury*, 1 McCray 429; 3 Fed. Rep. 14.

shall not be entitled to take possession of the mortgaged premises prior to a foreclosure, the mortgagor may take a valid assignment of the rents and profits, and the assignee may enforce his right to take them.¹¹ In such a case the mortgagor is entitled to the rents accruing until there has been a foreclosure, a sale, and the title to the mortgaged premises has vested in the purchaser. And where the lessee was the purchaser, but there was a delay of several weeks after the sale before he received his deed, during which a quarter's rent fell due, it was held that the lessor (and mortgagor) was entitled to such rent.¹² If the mortgagee take a lease of the premises from his mortgagor, and afterwards the equity of redemption be sold he can not insist, as against the purchaser, that the rents be set off against the mortgage debt.¹³ After a mortgage has been given, the mortgagor cannot make a lease that will be binding on the mortgagee.¹⁴ If the mortgagee enter for breach of the condition of the mortgage, and accept rent from the lessee, the latter becomes his tenant under a tenancy from year to year, and not for the term as fixed by the lease.¹⁵ But if he do not so accept rent, he may treat the lessee as a trespasser.¹⁶ The lessee can not compel the mortgagor to pay off the mortgage; his remedy being an ordinary action for damages, if he be dispossessed under it by reason of its terms.¹⁷ But if the mortgagee take possession in a State where no statute authorizes him to do so, on default of the mortgagor, and he takes it by reason of the consent of the latter, a verbal agreement of the lessee to pay such mortgagee the rent under the lease, does not continue the existing tenancy, nor put him in the place of the lessor. If held valid at all, it must be held to be a new agreement.¹⁸ If the lessee covenants in the lease to pay the royalties to the person holding a

¹¹ *Syracuse City Bank v. Tallman*, 31 Barb. 201; *Argall v. Pitts*, 78 N. Y. 239.

¹² *Clason v. Corley*, 5 Sandf. 447.

¹³ *Scott v. Fritz*, 51 Pa. St. 418. See *Taliaferro v. Gay*, 78 Ky. 406.

¹⁴ *McDermott v. Burke*, 16 Cal. 580; *Russem v. Wanser*, 53 Md. 92; *Hienshaw v. Wells*, 9 Humph. 568.

¹⁵ *Hughes v. Bucknell*, 8 C. and P. 566.

¹⁶ *Bireh v. Wright*, 1 T. R. 378; *Thunder v. Belcher*, 3 East 449; *Rogers v. Humphreys*, 4 Ad. and El. 299.

¹⁷ *Costigan v. Hastler*, 2 Sch. and Lef. 160.

¹⁸ *Hogsett v. Ellis*, 17 Mich. 351.

mortgage on the premises, such person may maintain an action against him to recover such royalties, irrespective of the fact that such lease is under seal, under the modern system of procedure.¹⁹

§ 387. Mortgage of oil or mining lease in Pennsylvania.

In Pennsylvania statutes control the mortgaging of mining leases. By the Act of April 27, 1855²⁰ it is declared "to be lawful for every lessee for term of years of any colliery, mining land, manufactory, or other premises, to mortgage his or her lease or term in the demised premises, with all buildings, fixtures and machinery thereon, to the lessee belong [ing] and thereunto appurtenant, with the same effect as to the lessee's interest and title, as in the case of the mortgaging of a freehold interest and title as to lien, notice, evidence and priority of payment." It also provides that the mortgage must "be in like manner acknowledged and placed of record in the proper county, together with the lease, and that such mortgage shall in nowise interfere with the landlord's rights, privity or remedy for rent, and such mortgages may be sued out as in other cases." A subsequent Act (April 3, 1868)²¹ provides that "in all cases of mortgages upon leasehold estates, the mortgagees shall have the same remedies for the collection thereof which mortgagees of real estate have under the laws of this commonwealth." A third Act (May 13, 1876)²² provides "whenever a lease or term of years shall have heretofore been or shall hereafter be mortgaged under the Act of April 27, 1855, . . . if the lease shall be recorded in the deed books of the proper county before the execution of the mortgage or shall thus be recorded

¹⁹ Central Trust Co. v. Berwind-White Coal Co., 95 Fed. Rep. 391.

If the lease be taken after a mortgage has been placed on the premises by the lessor, it is subject to the mortgage, even though the mortgage was contested; and if its validity be sustained, he is not entitled to claim the proceeds of the mine while operated by a receiver

appointed in a foreclosure suit, as against the mortgagee on the ground that he expended money to render them productive. G. B. Ming. Co. v. First National Bank, 95 Fed. Rep. 35; 35 C. C. A. 510, affirming 89 Fed. Rep. 449.

²⁰ P. L. 369.

²¹ P. L. 57, Sec. 1.

²² P. L. 160.

at the time of recording the mortgage, such recording shall be deemed a sufficient compliance with the requirements of the Act with reference to recording such lease." And it also provides that a "full distinct reference" shall "be made in said mortgage to the book and page where the said lease is recorded." Under the first Act it has been held, in order to give priority of the mortgagee over an execution creditor of the mortgagor, the lease must be recorded with the mortgage.²³ And under this statute, recording the mortgage with a copy of the lease, and referring to the latter as recorded with a former mortgage, it was held to be a substantial compliance with the act.²⁴ The Act of 1868 applies to actions begun before it was enacted, to enforce the collection of mortgages in the same manner as it provides for.²⁵ Of course, all three statutes must be construed in *pari materia*.²⁶ The Act of 1855 applies to leases for oil or gas, although enacted before either was discovered.²⁷ The mortgage and lease need not bear the same date, if recorded at the same time in the same connection.²⁸ If the mortgage cover the personal property on the leasehold premises, the mortgagee may follow and recover it wherever he finds it, notwithstanding his debt is not due at the time he claims it.²⁹ Neither the Act of 1855 nor that of 1868 embrace a leasehold vesting a freehold interest in the mortgagor.³⁰ The Acts of 1855 and 1876 apply to a leasehold interest in a city lot for a term of years, the lessee paying a yearly rent and being required to erect a building thereon.³¹ The word "fixture" as used in the Act of 1855 is not to be construed in its strict sense, but in a comprehensive way, and includes mine cases and all such machinery and ap-

²³ Sturtevant's Appeal, 34 Pa. St. 149; Glading v. Frick, 88 Pa. St. 460. See First National Bank v. Sheaffer, 149 Pa. St. 236; 24 Atl. Rep. 221.

²⁴ Ladley v. Creighton, 70 Pa. St. 490.

²⁵ Hosie v. Gray, 71 Pa. St. 198.

²⁶ Glading v. Frick, 88 Pa. St. 460.

²⁷ Gill v. Weston, 110 Pa. St. 312; 1 Atl. Rep. 921.

²⁸ Gill v. Weston, 110 Pa. St. 312; 1 Atl. Rep. 921.

²⁹ Gill v. Weston, 110 Pa. St. 312; 1 Atl. Rep. 921.

³⁰ Railroad Co. v. Sanderson, 109 Pa. St. 583.

³¹ Hilton's Appeal, 116 Pa. St. 351; 9 Atl. Rep. 342.

pliances which are essential to the operation of a colliery, not, however, prop-timber.³²

§ 388. Mortgagor may remove gas, oil and minerals.

The mortgagor of gas, oil or mining lands may extract the oil or gas or remove the minerals, and convert them into money, if the gas or oil wells or mine operated were dug or opened at the time the mortgage was placed upon the premises; but if they were not, then the lands cannot be so worked, for it is waste as against the mortgagee to permit it, even though the land was purchased as mineral land.³³ To remove and convert into money minerals underlying the soil is not waste, unless it was necessary to penetrate the soil to secure such minerals.³⁴ The only restriction on the mortgagor is that he must not endanger or seriously impair the lien of the mortgage.³⁵ In one case, after decree of foreclosure and execution issued, the mortgagor quarried stone from a quarry, already open; and it was held that as between him and the mortgagee, the latter was entitled to the stone.³⁶

§ 389. Mortgagor in possession.

In this country the mortgagor is usually entitled to possession after default, and until a foreclosure of the mortgage and sale of the mortgaged premises, unless a receiver be appointed; and also until the time for redemption has expired, where a redemption is allowed. Where a statute provided that the mortgagor should be entitled to the possession of lands or tenements sold under execution, until the expiration of fifteen months from

³² Baker v. Atherton, 15 Pa. Co. Ct. Rep. 471.

³³ Ward v. Carp River Iron Co., 47 Mich. 65; 10 N. W. Rep. 109.

³⁴ Duff's Appeal, 21 W. N. C. 491; Capner v. Mining Co., 2 Greens. (N. J.) Ch. 467; Childs v. Hurd, 32 W. Va. 66; 9 S. E. Rep. 362; Vervalen v. Older, 4 Halst. (N. J.) Ch. 98; Leport v. Mining Co., 3 N. J. L. Jr. 280.

³⁵ Duff's Appeal, 21 W. N. C. 491; Ward v. Carp River Iron Co., 50 Mich. 522; 15 N. W. Rep. 889; Vervalen v. Older, 4 Halst. (N. J.) Ch. 98.

³⁶ American Trust Co. v. North Quarry Co., 31 N. J. Eq. 89. See Leport v. Mining Co., 3 N. J. L. Jr. 280.

the time of the sale, and use and enjoy the premises without being guilty of waste, in the same manner and for the like purposes, in which and for which they were used and applied prior to the sale, doing no permanent injury to the freehold, it was held the working of the open mines and the removal of ore from them was permitted by the statute; but not the opening of new mines.³⁷ "The judgment debtor was entitled to continue the working of a mine in a reasonable and prudent manner, having regard to the customary working before the sale, and to dispose of the proceeds. If the mining was improper, excessive or wasteful, it might at any time have been restrained, and the parties responsible for and held liable for the damages."³⁸ Where the mine underlies a farm, which has been mortgaged for the purchase money, any necessary and proper use of the farm in carrying on the mining operations is not a waste.³⁹ But if the operations proceed so far as to endanger the security, then the holder of it is entitled to an injunction restraining the further operation of the mine.⁴⁰

§ 390. Mortgagee in possession.

Where the mortgagee of a mining property goes into possession of the mortgaged premises, by reason of a default in payment, he has a right to work the mines that are open, but he is not bound to do so. He ought not to advance more money in a mining speculation than a prudent man would do; for if he does, and loses it, he cannot charge the loss up to the mortgagor.⁴¹

³⁷ Ward v. Carp River Iron Co., 47 Mich. 65; 10 N. W. Rep. 109.

³⁸ Ward v. Carp River Iron Co., 50 Mich. 522; 15 N. W. Rep. 889.

³⁹ Capner v. Mining Co., 2 Gr. Ch. (N. J.) 467.

⁴⁰ Appeal of Duff, 21 W. N. C. (Pa.) 491. A stone quarry may be operated by the mortgagor. Vervallen v. Older, 4 Halst. Ch. 98.

See where an insolvent corporation, after decree in foreclosure and an execution issued against it, quarried stone on the premises and left

it thereon, it was held that the stone thus quarried was subject to the lien of the mortgage. American Trust Co. v. Quarry Co., 31 N. J. Eq. 89. See Lepout v. Mining Co., 3 N. J. L. J. 280.

⁴¹ Rowe v. Wood, 1 J. and W. 555; Elias v. Snowden Slate Co., 4 App. Cas. 455; 18 L. J. Ch. 811; 26 W. R. 869; 38 L. T. 871; Hughes v. Williams, 12 Ves. 493; Thorneycroft v. Crockett, 16 Sim. 445; 2 H. L. Cas. 239; 12 Jur. 1081.

In such an instance the mortgagee is entitled to his expenses in necessary repairs of the mine, as "just allowances."⁴² If the security is insufficient to satisfy the mortgage, the mortgagee may open new mines on the mortgaged premises, and the court will allow him his costs in so doing.⁴³ If the opening of a new mine results in a loss, he must pay it; if in a profit, the mortgagor is entitled to a credit on his debt to the extent of the amount of the profit.⁴⁴ But if the security is sufficient, then the mortgagee in possession may not open a new mine.⁴⁵ If the mortgagor may not open a new mine, his mortgagee in possession may not. The mortgagee's right in the premises is measured by the rights of the mortgagor at the time the mortgage is executed.⁴⁶ In case of a default in the mortgage, the mortgagee, instead of taking possession, may apply for a receiver to operate the mine, for a colliery is a business.⁴⁷ But the mortgagor cannot secure the appointment of a receiver when the mortgagee is in possession, even though he alleges misconduct on the latter's part; for the mortgagor cannot in that way turn out the mortgagee so long as any of the debt remains unpaid.⁴⁸ If the mine be flooded by the careless conduct of the mortgagee in working it, he will be liable to make good the loss.⁴⁹ There ought to be inserted in every mortgage of a colliery, and this is also true of every mortgage on oil or gas lands, a clause enabling the mortgagee, in case he takes possession, or, where an agreement as to possession is not allowed, to apply for and have a receiver appointed to work the mine, if the mine

⁴² *Tipton Green Colliery Co. v. Tipton Moat Co.*, 7 Ch. Div. 192; 47 L. J. Ch. 152; 26 W. R. 348. See *Millett v. Davey*, 31 Beav. 470; 32 L. J. Ch. 122; 7 L. T. 551; 11 W. R. 176; 9 Jur. (N. S.) 92.

⁴³ *Hughes v. Williams*, 12 Ves. 493.

⁴⁴ *Millett v. Davey*, *supra*.

⁴⁵ *Thornycroft v. Crockett*, 16 Sim. 445; 2 H. L. Cas. 239; 12 Jur. 1081; *Hood v. Easton*, 2 Giff. 692; 2 Jur. (N. S.) 729; 27 L. T. (O. S.) 295; 4 W. R. 575.

⁴⁶ *Elias v. Griffiths*, 8 Ch. Div. 521; 46 L. J. Ch. 806; 26 W. R. 869; 38 L. T. 871; S. C. 4 App. Cas. 454; 48 L. J. Ch. 203.

⁴⁷ *Jefferys v. Smith*, 1 J. and W. 298; *Gloucester Bank v. Rudry Colliery Co.* [1895], 1 Ch. 629; *Campbell v. Lloyd's Bank* [1891], 1 Ch. 136, note; *Peck v. Trinsmaran Co.*, 2 Ch. Div. 115; 24 W. R. 361.

⁴⁸ *Rowe v. Wood*, 1 J. and W. 555; 2 J. and W. 553.

⁴⁹ *Taylor v. Mostyn*, 33 Ch. Div. 226.

be a material portion of the security.⁵⁰ If the mortgage is of the interest of one co-tenant, the mortgagee is entitled to the same account as the co-tenant himself.⁵¹ If the mortgagee in possession of a colliery improperly work it, his mortgagor may obtain an injunction to prevent the wrong working of it, though not the proper working.⁵² As against a mortgagee in possession, a mortgagor is entitled to an accounting; and in such an action the mortgagee must account for not only all he has actually received, but for what he might have received but for his gross mismanagement or wilful neglect.⁵³

§ 391. Mortgagee in possession, English rule.

We take the following statement of the law in England with reference to mines, where the mortgagee is entitled to possession of the premises after default made, from Bainbridge on Mines:⁵⁴ "A mortgagee has in law an absolute estate in the lands mortgaged, and is entitled, after default in payment of the mortgage debt, to take immediate possession, and to receive the rents and profits of the mortgaged estate."⁵⁵ And as regards the mines and minerals within or under the lands comprised in the mortgage, he will be entitled to work any mines or quarries which have been already opened; but, of course, he is not bound to do so—at least, in the general case; and in no case ought he to advance more money in a mining speculation than a prudent owner would do. For, as Lord Eldon very justly observed, if he were owner he might speculate for himself as much as he pleased—*scil.*, because the advantages, whatever they might be, would be his, and if the speculation turned out unfortunate, he would bear the loss; but could a mortgagee be

⁵⁰ Norton v. Cooper, 5 De G. M. and G. 728; 25 L. J. Ch. 121; 23 L. T. (O. S.) 125; 2 W. R. 362.

⁵¹ Bentley v. Bates, 4 Y. and C. Exch. 182; 9 L. J. Exch. 30; 4 Jur. 552.

⁵² Taylor v. Mostyn, 23 Ch. Div. 583; 53 L. J. Ch. 89; Sheehy v. Muskerry, 1 H. L. Cas. 576; 7 Cl. and F. 1; Taylor v. Mostyn, 25 Ch. Div. 48.

⁵³ Hughes v. Williams, 12 Ves. 493; Norton v. Cooper, 25 L. J. Ch. 121; 5 De G. M. and G. 728; 23 L. T. (O. S.) 125; 2 W. R. 362.

As to preference of a supply man furnishing coal to run a gas plant in the hands of trustees, see Louisville & N. R. Co. v. Memphis Gaslight Co., 60 C. C. A. 141; 125 Fed. Rep. 97.

⁵⁴ Pp. 32-38 (5th ed.).

⁵⁵ Williams v. Medlicott (1819), 6 Price 496.

required to risk his own fortune in such a speculation, and to incur the hazards of an adventure the benefits of which would redound to the mortgagor? ⁵⁶ A mortgagee in possession being accountable for wilful default, it seems to follow, that if the property in mortgage be a mineral estate, the mortgagee will be bound to make the most reasonable use of the estate — *scil.*, because the nature of the estate should have been contemplated before he took possession; and at the same time, if he exceed the expenditure and risk demanded from a prudent owner, he will not be allowed such unnecessary or extravagant expenses, but will speculate at his own risk. Where a mortgage term of 500 years had been created in lands by the fee simple owner of the lands; and he subsequently opened a slate quarry in the lands, and worked such quarry (through certain lessees thereof who paid him a royalty of 1-18th the slate gotten); and afterwards the mortgagees entered — the court said, that they could (although only termors) continue the working of that slate quarry, although it had not been opened at the date of the creation of the term. And it appearing that the mortgagees had obtained an order absolute of foreclosure, they were held to have become termors absolute for the residue of the 500 years. ⁵⁷ In *Hughes v. Williams*, ⁵⁸ a mortgagee in possession had opened a slate quarry at an expense of 681.— and had made 21. out of the quarry — *i. e.*, he had sustained a loss of 661.; and the court left him to bear that loss, as he had speculated at his own peril. But in *Tipton Green Colliery Co. v. Tipton Moat Co.*, ⁵⁹ where the defendants were unpaid vendors of a leasehold colliery, and they were in possession (in respect of their lien for the unpaid purchase money), and had expended divers sums of money upon the colliery (in necessary repairs and otherwise); and the plaintiffs (the purchasers) claimed to redeem them — the defendants were allowed (as a matter of course, *i. e.*, as

⁵⁶ *Rowe v. Wood* (1820), 1 J. and W. 315, 555.

⁵⁷ *Elias v. Snowdon Slate Co.* (1879), 4 App. Cas. 455; 48 L. J. Ch. 811; 41 L. T. 289; 28 W. R. 54.

⁵⁸ (1806) 12 Ves. 496; and see

Thorneycroft v. Crockett (1848), 16 Sim. 445; 12 Jur. 1081; 2 H. L. Cas. 239.

⁵⁹ (1877) 7 Ch. D. 192; 47 L. J. Ch. 152; 26 W. R. 348.

“just allowances”) all their expenses on necessary repairs, but not anything for expenses beyond. In *Millett v. Davey*,⁶⁰ the plaintiffs were mortgagees in possession of the defendant's one equal undivided moiety of certain lands; and, in conjunction with the owner of the other undivided moiety, they made a lease of the mines, granting also certain surface rights; and under the lease, a large quantity of the minerals had been gotten, but at a loss — and a considerable part of the surface also had been damaged, in the exercise of the surface rights; and the lessees paid up all royalties accrued due, and abandoned the mine; and the plaintiffs obtained a judgment for foreclosure against the defendant — the security being proved to have been insufficient at the time the mortgagees entered — the court said, that they were not to be charged with the value of the coal (the defendant's moiety thereof) which had been gotten by the lessees, but only with the royalties (the defendant's moiety thereof) received by the plaintiffs, and not at all for the surface damage.

“In a mortgage of mines, there would usually be inserted special clauses enabling the mortgagees, in case they took possession (or become entitled to take possession), to appoint a receiver and manager, and to expend moneys on the working and development of the mines (including the opening of the new mines) — and in such a case, the mortgagees would be allowed their lawful expenditure with interest thereon.⁶¹ And the like clauses might be usefully inserted in every mortgage of lands containing mines, where the mines were a material portion of the security; and as regards keeping accounts of the mortgagees' workings, the clauses should provide for the mortgagor having inspection of the books of the colliery, but not (save at the expense of the mortgagor) for the mortgagees rendering him any account of the workings.⁶²

“And, generally, as regards the opening of new mines, it appears the mortgagee may do so, if his security is insufficient;

⁶⁰ (1862) 31 Beav. 470; 32 L. J. G. M. and G. 728; 25 L. J. Ch. 121; Ch. 122; 7 L. T. 551; 11 W. R. 176; 23 L. T. (O. S.) 125; 2 W. R. 362. 9 Jur. (N. S.) 92.

⁶² *Ibid.*

⁶¹ *Norton v. Cooper* (1854), 5 De

and if in such a case he acts *bona fide*, the court will not restrain him.⁶³ But he opens the new mines at his own peril, that is to say — if the working results in a loss, and if the working results in a profit, the profit goes in towards the discharge of his mortgage debt.⁶⁴ But, *nota bene*, a mortgage of lands (in which are mines), if his mortgage is by demise only (*i. e.*, if he is entitled only to a term of years in the lands), may not open new mines — for a termor may not do so, unless he is without impeachment of waste. But just as any termor entitled absolutely may work the open mines, so may a termor who is a mortgagee,⁶⁵ at all events, if his security is insufficient. And if the mortgagor (or other person entitled under him subject to the mortgage term) should, during the continuance of the mortgage, lawfully open a new mine within or under the lands demised by the mortgage deed, the mortgage termor may thereafter work such newly opened mines — at least, if his security be insufficient. And all the like observations are applicable also to a new quarry — it being nevertheless understood that the quarry has been opened — that is to say, for the purpose of being worked as a commercial speculation, and not merely for the purpose of digging a few blocks of stone thereout for some specific private purpose.⁶⁶ But it rather appears, that if the security is not insufficient, the mortgagee has no right to open new mines, and that if he do open and work them, he will be charged with all receipts from the mines, without any allowance for the expenses in opening and working them.⁶⁷

“The mortgagee of a colliery, in lieu of taking possession of the colliery — whereby he incurs the liabilities above indicated

⁶³ Hughes v. Williams (1806), 12 Ves. 493.

⁶⁴ Millett v. Davey (1862), 31 Beav. 470, at p. 476; 32 L. J. Ch. 122; 7 L. T. 551; 11 W. R. 176; 9 Jur. (N. S.) 92.

⁶⁵ Elias v. Griffiths (1878), 8 Ch. D. 521; 46 L. J. Ch. 806; 48 L. J. Ch. 203; 26 W. R. 869; 38 L. T. 871; S. C. (sub nom.) Elias v. Snowdon Slate Co. [1879], 4 App.

Cas. 454; 48 L. J. Ch. 811; 41 L. T. 289; 28 W. R. 54.

⁶⁶ Elias v. Griffiths (1878), 8 Ch. D. 521; S. C. (sub nom.) Elias v. Snowdon Slate Co. (1879), 4 App. Cas. 454.

⁶⁷ Thorneyeroff v. Crockett (1848), 16 Sim. 445; 12 Jur. 1081; 2 H. L. Cas. 239; Hood v. Easton (1856), 2 Giff. 692; 2 Jur. (N. S.) 729, 917; 27 L. T. (O. S.) 295; 4 W. R. 575.

—ought to appoint a receiver (who will be the mortgagor's agent); and if a manager also should be necessary, he may obtain an order for the appointment of a receiver and manager; and he may obtain such an order even after he has entered into possession.⁶⁸ And the reason why the court appoints a receiver and manager is, because the security would otherwise go to ruin; and (where the colliery is a leasehold one) it might even be forfeited by the lessor — *scil.*, for neglect to work or for some other breach of the covenants in the lease;⁶⁹ and the mere fact that the colliery business is not specifically comprised in the mortgage will not make any difference, a colliery being a business.⁷⁰

“In *Rowe v. Wood*,⁷¹ the mortgagees were in possession, and the plaintiff (the mortgagor) was the party who applied for a receiver and manager of the mine — alleging misconduct on the part of the defendants in the management; but the court said, that the plaintiff could not (in that way) turn out the mortgagees from the possession so long as they alleged that they were unpaid (even a sixpence of) their mortgage debt; and all that the plaintiff (as mortgagor) was entitled to, was, to require the defendants to keep the proper accounts and to permit his inspection thereof.

“In *Norton v. Cooper*,⁷² the mortgage was of mines, with power for the mortgagees to enter and develop the mortgaged premises, and to expend money for that purpose; and the mortgagor, suing for redemption, claimed to charge the mortgagees with an occupation rent, and also to disallow them all their expenditure — both which claims the mortgagees, of course, resisted; and they also refused accounts, save at the expense of the mortgagor. The accounts as taken in the suit showed — 16,654*l.* owing on the mortgage for principal and interest;

⁶⁸ *Campbell v. Lloyd's Bank*, cited in [1891] 1 Ch. 136, note; *Peck v. Trinsmaran Co.*, 2 Ch. D. 115; 24 W. R. 361.

⁶⁹ *Gloucester Bank v. Rudry Colliery Co.* [1895]. 1 Ch. 629; 64 L. J. Ch. 451; 72 L. T. 375; 43 W. R. 486; 2 Manson 223; 12 R. 183.

⁷⁰ *Jefferys v. Smith* (1820), 1 J. and W. 298; *Gloucester Bank v. Rudry Colliery Co.*, *supra*.

⁷¹ (1820) 1 J. and W. 315; (1822) 2 J. and W. 553.

⁷² (1854) 5 De G. M. and G. 728; 25 L. J. Ch. 121; 23 L. T. (O. S.) 125; 2 W. R. 362.

60,027*l.* owing as moneys properly expended in developing the mines; and 3,747*l.* owing as moneys properly paid in redeeming a previous mortgage; and 74,637*l.* received as profits from the mines — leaving 5,790*l.* still owing to the mortgagees; and the court allowed the whole expenditure, and also gave the mortgagees their costs of suit — holding that their conduct had not been vexatious, merely because they refused the accounts save on the mortgagor's first paying for the expense of the accounts; and the court refused, of course, to charge the mortgagees with any occupation rent.

“In *Bentley v. Bates*,⁷³ where there were two lessees of a mine, and they were working it in quasi-partnership, and the plaintiff was the mortgagee of the interest of one of the lessee-partners, and claimed an account against the defendant who was the other lessee (the mortgagor being also a co-defendant) — the court said, that the plaintiff was entitled to all the rights of his mortgagor, and was therefore entitled to have an account of the profits (and generally of the management by the defendant) of the mine; and that he need not, for that purpose, ask for a dissolution of the partnership, as he would have been obliged to do in the case of an ordinary mercantile business — for a co-tenancy (or joint partnership) of lands is not to be determined by a partition of the lands, before an account can be taken on behalf of one of the co-tenants against the other or others of them.

“In *Taylor v. Mostyn*⁷⁴ and *Mostyn v. Lancaster*,⁷⁵ certain lands containing coal mines (which in 1829 had been leased by the testator for a term which would expire in 1848) were devised to M. for his life, with remainder to M.'s first son in tail, and M. was empowered to lease the mines at his discretion: And M. (being in possession as tenant for life under the will) leased the mines in 1843 (for ninety-nine years) by way of mortgage to C. for securing a principal sum and interest, and with powers

⁷³ (1840) 4 Y. and C. Exch. 182;
9 L. J. Exch. 30; 4 Jur. 552.

⁷⁵ 23 Ch. Div. 583; 51 L. J. Ch.
696; 46 L. T. 648; 48 L. T. 715; 32

⁷⁴ (1882) 23 Ch. D. 583; 53 L. J.
Ch. 89; 49 L. T. 483; 32 W. R.
256.

W. R. 3, 686.

of working the mines similar to those contained in the 1829 lease — which mortgage was afterwards (in 1850) transferred to X., to whom M. was already otherwise very largely indebted; and M. at the same time mortgaged also his life estate to X. (or to a nominee of X.); and (by a lease in 1850) M. demised the mines to X.'s nominee for forty years at a dead rent, and at royalties — and the last mentioned lease was duly confirmed by M.'s first son (who had in the meantime attained his age of twenty-one years, and had duly barred the tail): Afterwards, the life estate of M., and the fee simple remainder of his first son, became vested in Mostyn and others (the defendants in *Taylor v. Mostyn*, and who were also the plaintiffs in *Mostyn v. Lancaster*); and the 1850 lease was assigned to Taylor and others (the plaintiffs in *Taylor v. Mostyn*), and in them (or in the plaintiff Taylor alone as a nominee for them) were also vested the 1843 lease and the mortgage of the life estate. And the plaintiffs in *Taylor v. Mostyn* (by virtue of the lease of 1850) sublet the mines to the defendants in *Mostyn v. Lancaster*, and Taylor at the same time (and by virtue of the lease of 1843) leased the mines to the same defendants for a term limited to expire in 1900: And the action of *Taylor v. Mostyn* being for foreclosure, and the action of *Mostyn v. Lancaster* being for an injunction to restrain the removal of the pillars of coal in the demised mines — The court held — That the lease of 1843 was a valid exercise of the leasing power⁷⁶ — and consequently that the plaintiffs in *Taylor v. Mostyn* (unless they were redeemed) might foreclose; and That the lease of 1850 (or the sublease derived out of it) did not (upon its true construction) authorize the getting of the pillars, save with the consent of M. (which consent, so far as regards the past workings, had not been obtained), although (on the expiration of the 1850 lease, and during the then residue, if any, of the life of M.) the consent of M. to the working of the pillars of coal under the lease of 1843 had been (in effect) already given by M. — and, consequently, that the defendants must (save during such residue as aforesaid, if any of the life of M.) be restrained

⁷⁶ *Sheehy v. Muskerry* (1848), 1 MacL. and R. 493; Ll. and Gt. Plunk H. L. Cas. 576; 7 Cl. and F. 1; 568.

from removing the pillars of coal. And at a subsequent stage of litigation,⁷⁷ the plaintiffs in *Taylor v. Mostyn*, alleging that (owing to the decision in *Mostyn v. Lancaster*) their security was of vastly less value than the amount of their mortgage debt, neglected to prosecute their foreclosure decree; and, on the application of the defendants, the court directed them to do so, the order expressing that it was made at the express direction of the defendants — so that if the costs of the further prosecution of the decree should be found to have been (without any good purpose) forced on the plaintiffs, the defendants might be ordered personally to pay such costs; and the order gave the plaintiffs liberty to apply for a stay of all further proceedings. However, while the decree was being further prosecuted,⁷⁸ the defendants obtained from the court a declaration, that (as regards all the pillars of coal wrongfully removed by the mortgagees-lessees) the plaintiffs, as mortgagees, were to be charged with the full value of such coal, less only the cost of bringing it to bank (that is to say, allowing nothing for the cost of severing the coal); and it rather appearing that a flooding of the mines had been occasioned by the wrongful removal of such pillars, the court directed an inquiry as to that if (upon the result of that inquiry) the damage from the flooding should be traceable to the wrongful removal of the pillars of coal, the plaintiffs, as mortgagees, would be chargeable with that.”⁷⁹

ARTICLE 2.

GAS PLANT.

§ 392. Mortgage of gas plant.

§ 392. Mortgage of gas plant.

A franchise giving a right to “construct, own, maintain and operate” a gas or water plant may be mortgaged; and a mortgage on such a franchise of a plant in process of construction carries the plant with it.⁸⁰ It will also include tangible prop-

⁷⁷ (1883) 25 Ch. D. 48.

⁷⁸ 33 Ch. Div. 226.

⁷⁹ The expense of an unsuccessful effort in fishing for lost tubing has been allowed to a mortgagee

of an oil lease in possession. *Fuher v. Buckeye Supply Co.*, 5 Ohio C. Pl. 187; 7 Ohio N. P. 420.

⁸⁰ *Andrew v. National Foundry*, 76 Fed. Rep. 166; 22 C. C. A. 110;

erty as an incident, if such was the evident intent of the mortgagor and mortgagee.⁸¹ Even though the company had no power to execute the mortgage, yet it cannot raise that question on the ground that it was of a quasi-public character, so long as the municipality in which it is situated does not challenge the validity of the mortgage.⁸² The property should be sold as an entirety without redemption; and no redemption can be allowed when the foreclosure is in the United States Circuit Court, notwithstanding a State statute requires mortgaged property to be sold subject to the right to redeem.⁸³ Where the mortgagee takes possession of the plant, and the books and business, and carries on the business under the franchise, he presumably obligates himself to respond to the obligations of the franchise, or incidental to the collection of rates from consumers. And where a corporation is organized by the mortgagee to purchase the plant and franchise for no consideration other than the mortgage debt, in carrying on the business the corporation is the agent of the mortgagee, and is subject to any obligations imposed on the mortgagee by the former gas company and franchise, or incidental to the collection of rates from consumers.⁸⁴

36 L. R. A. 139; 46 U. S. App. 281; rehearing denied, 77 Fed. Rep. 774; 23 C. C. A. 454; 46 U. S. App. 619; Hays v. Galion, etc., Co., 29 Ohio St. 330; Louisville & N. R. Co. v. Memphis Gaslight Co., 125 Fed. Rep. 97; 60 C. C. A. 141.

⁸¹ Andrew v. National Foundry, *supra*.

⁸² American W. W. Co. v. Farmers' Loan, etc., Co., 73 Fed. Rep. 956; 20 C. C. A. 133; 36 U. S. App. 563.

⁸³ Farmers' Loan, etc., Co. v. Iowa Water Co., 78 Fed. Rep. 881.

The purchaser is entitled to at

once take possession as absolute owner. McKenzie v. Bismark Water Co., F. 6 N. D. 361; 71 N. W. Rep. 608.

⁸⁴ Fleming v. Taylor, etc., Co., 90 Kan. 763; 13 Pac. 228.

In this case after buying in the plant the new company discontinued the plant, but as a condition of the discontinuance of the business and removing the property, the court required 30 days' notice to be given, and the deposits made by consumers with the mortgagee as security for the payment of gas bills be refunded.

CHAPTER XVIII.

TRANSPORTATION AND EMINENT DOMAIN.

- § 393. Scope of chapter.
- § 394. Transportation of gas or oil a public use.
- § 395. Carriers of oil.—Tank cars.
- § 396. Transportation from State cannot be prevented.
- § 397. Transportation by pipe line.—Inter-state commerce.
- § 398. Regulation of transportation.
- § 399. Ownership of oil in pipe lines.
- § 400. May be endowed with powers of eminent domain.
- § 401. Artificial gas companies.—Eminent domain.
- § 402. Foreign companies excluded from use of power of eminent domain.
- § 403. Number of lines that can be laid in right of way acquired.
- § 404. Laying pipes in country highways, or on right of way of railroad.
- § 405. Measure of damages for taking right of way.
- § 406. Damages occasioned by gas company's trespass on land.
- § 407. Prospective damages for fires and explosions.
- § 408. Removal of pipe line, damages.
- § 409. Pipe line crossing right of way of railroad company.
- § 410. Revocation of license.
- § 411. Route, specifying in petition.—More than one route.
- § 412. Coal mine beneath pipe line.—Support.
- § 413. Well pipe passing through coal mine.
- § 414. Depth of pipe line.
- § 415. Free gas, cutting off, injunction.

§ 393. Scope of chapter.

In this chapter all questions of *negligence* in the transportation of oil or gas are eliminated, they finding an appropriate place in the chapters on Transportation and on Negligence, and in the one on Leaks and Explosions. So all discussions of the general principles and rules of practice of *eminent domain* are eliminated, except so far as they are peculiar to questions concerning gas and oil.

§ 394. Transportation of gas or oil a public use.

The transportation of natural gas or oil is a public use, as much so as a railway company engaged in the transportation of

articles of commerce. Indeed, natural gas and petroleum when brought to the surface and enclosed in tanks, reservoirs or pipes are articles of commerce, a commercial commodity. "The gas in the earth may not be a commercial commodity," said the Supreme Court of Indiana, "but, when brought to the surface and placed in pipes for transportation, it must assume that character as completely as coal on the cars or petroleum in the tanks. We suppose it clear that Pennsylvania could not prohibit the transportation of coal or petroleum to another State, and there is no difference between cases where coal is the commodity affected and those in which it is natural gas. It is no doubt true that there is a point at which a natural or a manufactured product is not an article of commerce, but, when it assumes such a form as fits it for transportation from State to State, it is, so far as the law of interstate commerce is concerned, transformed into a commercial commodity." "Natural gas is as much an article of commerce as iron ore, coal, petroleum, or any other of the like products of the earth. It is a commodity which may be transported, and it is an article which may be sold in the markets of the country."¹ There are many cases to the same effect; and it is now no longer an open question that the transportation of gas, whether artificial, manufactured, or natural, and oil, of whatever kind, is a public use;² and that a State may fix the rates to be charged for carriage within its limits, although not for interstate carriage. The reasonableness of the rate is open for review by the courts.^{2a}

¹ *State v. Indiana, etc., Co.*, 120 Ind. 575; 22 N. E. Rep. 778; 29 Am. and Eng. Corp. Cas. 237; 6 L. R. A. 579; *West v. Kansas Nat. Gas Co.*, 31 Sup. Ct. 564; 221 U. S. 229, affirming *Kansas Natural Gas Co. v. Haskell*, 172 Fed. 545; *Haskell v. Cowham*, 187 Fed. 403.

² *Bloomfield, etc., Co. v. Richardson*, 63 Barb. 437; *Carother v. Philadelphia Co.*, 118 Pa. St. 468; 12 Atl. Rep. 314; *Johnston v. People's Natural Gas Co. (Pa.)*, 7 Atl. Rep. 167; *West Virginia, etc., Co. v. Volcanic Oil and Coal Co.*, 5 W. Va. 382; *Johnston's Appeal (Pa.)*, 7 Atl. Rep. 167; *In re Ohio Valley Gas Co.*, 6 Pa. Dist. Rep. 200; 27 Pittsb. Leg. J. (N. S.) 321; *West Virginia,*

etc., Co. v. Ohio River Pipe Line Co., 22 W. Va. 600; *Jamieson v. Indiana, etc., Co.*, 128 Ind. 555; 28 N. E. Rep. 76; 12 L. R. A. 652; 34 Am. and Eng. Corp. Cas. 1; *Manufacturers' Gas and Oil Co. v. Indiana, etc., Co.*, 155 Ind. 545; 58 N. E. Rep. 706; *Manufacturers' Gas and Oil Co. v. Indiana, etc., Co.*, 155 Ind. 566; 58 N. E. Rep. 851.

Conducting natural gas from the wells to consumers is the transportation of freight. *Carother v. Philadelphia Co.*, 118 Pa. St. 468; 12 Atl. Rep. 314.

^{2a} *Tucker v. Mo. Pac. Ry. Co.*, 82 Kan. 222; 108 Pac. Rep. 89; *Prairie Oil & Gas Co. v. Ehrhardt*, 244 Ill. 634; 91 N. E. Rep. 680.

§ 395. Carriers of oil — tank cars.

Carriers of oil must serve all shippers impartially. If they fail to furnish tank cars for oil, in consequence of which the shipper is required to ship oil in barrels, they are liable for the damages resulting therefrom, under Sec. 8 of the Interstate Commerce Act providing that "any common carriers" subject to its provisions shall be liable for the "full amount" of all damages caused by violation of its provisions. If they charge for carrying oil in barrels when the use of tank cars for shipments has not been open impartially to shippers, in consequence of which such shippers have been deprived of the use of such cars, they will be required by the Interstate Commerce Commission to refund the amount received for the transportation of the barrels.³

§ 396. Transportation from State cannot be prevented.

As gas and oil are instruments of commerce when confined in receptacles, a State cannot prevent their transportation beyond its boundaries, however desirable such prevention may be. This has been attempted without success.⁴ Because of its local character, however, it occupies a position distinct from other articles of commerce. "Upon this point," to quote from an Indiana case, "we affirm that natural gas is characteristically and peculiarly a local product, that its production is confined to a limited territory, that because of its local character and peculiarities it is a proper subject of State legislation, and cannot, so far as regards local protection, be made the subject of general legislation by Congress; or, at all events, that it does not require a uniform system as between the States for its regulation."⁵

³ Independent Refiners' Association v. Western, etc., R. R. Co., 4 Inter. St. Rep. 162.

⁴ State v. Indiana, etc., Co., 120 Ind. 575; 22 N. E. Rep. 778; 6 L. R. A. 579; 29 Am. and Eng. Corp. Cas. 237; Jamieson v. Indiana, etc., Co., 128 Ind. 555; 28 N. E. Rep. 76; 12 L. R. A. 652; 34 Am. and Eng.

Corp. Cas. 1; Manufacturers' Gas, etc., Co. v. Indiana, etc., Co., 155 Ind. 545; 58 N. E. Rep. 706; Manufacturers' Gas, etc., Co. v. Indiana, etc., Co., 155 Ind. 566; 58 N. E. Rep. 851; Kansas Natural Gas Co. v. Haskell, 172 Fed. Rep. 545.

⁵ Jamieson v. Indiana, etc., Co., *supra*.

§ 397. Transportation by pipe line.—Interstate commerce.

There is no doubt about petroleum or natural gas (and even artificial gas) being the subject of commerce, even of interstate commerce. The Indiana Supreme Court has so considered it, saying:

"Natural gas is as much an article of commerce as iron ore, coal, petroleum, or any other of the like products of the earth. It is a commodity which may be transported, and it is an article which may be bought and sold in the markets of the country. The gas in the earth may not be a commercial commodity, but, when brought to the surface and placed in pipes for transportation, it must assume that character as completely as coal on the cars or petroleum in the tanks. We suppose it clear that Pennsylvania could not prohibit the transportation of coal or petroleum to another State, and there is no difference in principle between cases where coal is the commodity affected and those in which it is natural gas. It is no doubt true that there is a point at which a natural or manufactured product is not an article of commerce, but, when it assumes such a form as fits it for transportation from State to State, it is, so far as the law of interstate commerce is concerned, transformed into a commercial commodity. For the purposes of taxation an article of property may not be regarded as a commercial commodity until it has started on its way from one State to another, but property that may become an article of commerce cannot be kept in the State where it was produced by a State law forbidding its transportation. If this were not so, then, not only might coal and petroleum be kept within the State in which they were produced, but so might corn and wheat, cotton, and fruit, and lead and iron. If such laws could be enacted and enforced, a complete annihilation of interstate commerce might result and it was to prevent the possibility of such result that the provision vesting exclusive power in the Federal government was written in the National Constitution."⁶ Natural gas brought

⁶State v. Indiana, etc., Co., 120 Ind. 575; 22 N. E. 778; 29 Am. and Eng. Corp. Cas. 237; 6 L. R. A. 579; 2 Inter St. Com. Reps. 758; Manufacturers' Gas and Oil Co. v.

Indiana, etc., Co., 156 Ind. 679; 60 N. E. Rep. 1080; Manufacturers' Gas and Oil Co. v. Indiana, etc., Co., 155 Ind. 566; 58 N. E. Rep. 851; Manufacturers' Oil and Gas Co. v.

from another State does not lose its interstate character so long as it remains in the pipe by reason of the fact that in the State of its destination a small quantity of gas is there procured and mixed with the gas in the pipe.^{6a} When natural gas was procured in Oklahoma, but carried to Kansas in a pipe and there mingled with Kansas natural gas so that the Oklahoma gas could not be distinguished, and thereafter the joint product was carried to other points in Kansas, it was held that the transportation of the joint product was not in interstate commerce.^{6b} Both these cases relate to gas brought from Oklahoma into Kansas, and in principle it would seem they are in conflict. It is pertinent to ask how much Kansas gas must be injected to destroy the interstate character of the Oklahoma gas. And who is to judge just when the interstate character of the gas is destroyed?

§ 398. Regulation of transportation.

Notwithstanding that natural gas is the subject of interstate commerce, that will not prevent the State, in the exercise of its police power, taking such steps as will protect its inhabitants and their property, even though the effect is to prevent its general transportation. Such an instance occurs where the State prohibits a greater pressure in the pipes than a certain amount, although such a pressure is not sufficient to carry the gas from the field where it is found beyond the boundaries of the State. In an Indiana case the following language was used in discussing the right of the State to regulate the transportation of gas:

Indiana, etc., Co., 155 Ind. 545; 58 N. E. Rep. 706; *West v. Kansas Natural Gas Co.*, 31 Sup. Ct. 564; 221 U. S. 229, affirming 172 Fed. 545; *Haskell v. Kansas Natural Gas Co.*, 224 U. S. 217; 32 Sup. Ct. 442; 56 L. Ed. 738.

^{6a} *Landon v. Public Utilities*, 234 Fed. 152.

^{6b} *State v. Flannelly*, 96 Kan. 372; 152 Pac. 22.

In this case it was also held that the sale in Kansas of gas brought from Oklahoma could be regulated

by the Kansas authorities until Congress acted upon the subject.

A gas company, which manufactures its product within the limits of Pennsylvania and sells its entire product within the same limits to a railroad company and a sleeping car company for lighting cars, is not engaged in interstate commerce, although the cars themselves are operated in interstate traffic. *Altoona City v. O'Leary*, 60 Pa. Super. Ct. 159.

"If natural gas cannot be safely transported to a State distant from its source, it is because of its natural qualities, and not because of legislation. The restriction upon transportation, if there be any, is in the inherent nature of the thing itself; none is put upon it by the statute, since the statute does no more than regulate its conveyance from the wells to points of distribution in such a mode as to protect lives and property. This it does, and nothing more. If the distribution within the State cannot be made at safe pressure, it is because of the character of the local natural product, not because of any standard of pressure fixed by legislation. Fixing the standard of pressure is not a regulation of interstate commerce; possibly it might be different if the product were not a local one, and intrinsically dangerous; but natural gas is local and is dangerous in its transportation and use. It is the inherent element of danger that makes it necessary to handle, store, and transport natural gas in peculiar modes, and under reasonable restrictions. It is true that natural gas may be an article of commerce, but it is not an ordinary article of commerce. It is not a commercial commodity while in the earth, it is only so when it ceases to become real estate and becomes personal property. It cannot in any event become an ordinary article of merchandise in which no dangerous elements combine. In a limited and qualified sense it is a commercial commodity, but the limitation is not put upon it by any statute. That is done by nature. It is, no doubt, so far a commercial commodity that this State cannot prohibit its transportation to another State by direct legislation. If it can be taken from the well and transported to another State under a safe pressure the State cannot prohibit its transportation, nor can the State establish one standard of pressure for its own citizens and another standard for the citizens of other States. But nothing of the kind is attempted, directly or indirectly, for, as we have shown, there is one standard and no prohibition. The standard is for all. If it is such as will allow the transportation of natural gas to other States, there is no restriction or burden upon interstate commerce. If there is a prohibition in any sense, or to any extent, it is in the nature of the commodity itself, but there is no prohibition. We have shown, as we believe, that natural gas, because of its local nature and intrinsic qualities, cannot be

made the subject of general commerce between the States, and have thus established the conclusion that it cannot, so far as local safety is concerned, be made the subject of uniform Federal legislation, but is a legitimate subject for reasonable police regulation. But if it be conceded that it is the subject of general commerce between the States, it may, nevertheless, be the subject of legislation by the State in so far as the regulation is local. In every case in which there is an authoritative decision upon the question it is affirmed that the States may make police regulations, although articles of commerce may be affected by such regulations. Interstate commerce, it is true, can neither be burdened nor restricted. But the establishment of a reasonable police regulation for the local safety is neither a burden nor a restriction within the meaning of the law; since, if there be a lawful exercise of a governmental power, there can be no wrong. Our own cases recognize the power to enact reasonable police regulations concerning articles of commerce. But our decisions are of comparatively little importance upon this question, since the question is one to be determined by the decisions of the Supreme Court of the United States. The most familiar instances of the exercise of police power over commercial commodities are those wherein intoxicating liquors were the subject of legislation, and it has been uniformly held that such commodities are subject to State authority."⁷

⁷ *Jamieson v. Indiana, etc., Co.*, 128 Ind. 555; 28 N. E. Rep. 76; 12 L. R. A. 652; 34 Am. and Eng. Corp. Cas. 1; *Manufacturers', etc., Co. v. Indiana, etc., Co.*, 155 Ind. 566; 58 N. E. Rep. 851; *Manufacturers', etc., Co. v. Indiana, etc., Co.*, 156 Ind. 679; 60 N. E. Rep. 1080; *Consumers' Gas Trust Co. v. Harless*, 131 Ind. 446; 29 N. E. Rep. 1062; 15 L. R. A. 505.

In Oklahoma the legislature undertook to prevent the taking of natural gas out of the State, and enacted a statute that no gas company should be granted a charter unless there was a clause inserted in it to the effect that it would

only transport oil from one point in the State to another, and would deliver no gas to any person or corporation transporting gas out of the State. The company's right to the use of eminent domain was conditioned on such a provision being inserted in its charter or articles of association. License to foreign corporations formed for the purpose of transporting natural gas by means of pipe lines was forbidden. The Circuit Court for the Eastern District of Oklahoma held the statute unconstitutional and enjoined the State officers enforcing it. *Kansas Natural Gas Co. v. Haskell*, 172 Fed. Rep. 545, affirmed 31 Sup. Ct.

§ 399. Ownership of oil in pipe lines.

Prima facie oil delivered to a pipe line belongs to the person to whose credit or in whose name it is delivered; and the pipe line company, when sued for the oil, cannot show that another owned it, or had an interest in it as a tenant in common.⁸ An interest represented by a run-ticket issued by a pipe line company storing and carrying oil may be garnisheed, although all the oil the company is intrusted with is mixed together and stored in a common stock in two States, in one of which the garnishee proceedings is brought, and although the particular oil for which the ticket was given was produced in the other State and was never in the State in which such proceedings are instituted.⁹

§ 400. May be endowed with powers of eminent domain.

Owing to the public character of transportation of oil and (natural) gas, companies producing or manufacturing such commodities may be endowed with the power of eminent domain, in order that they may secure a right of way for their pipe lines.¹⁰ "In this State the legislature, in the exercise of its discretion, has judged it proper to clothe companies, corporations and associations engaged in the business of furnishing petroleum and natural gas to the citizens of this State, for consumption, with the power of eminent domain, while it has not, as yet, thought proper to clothe companies, corporations and associations not so engaged with that power. It is not our province to inquire into the motions which prompted the legis-

564; 55 L. Ed.; 221 U. S. 229.

⁸ *Enterprise Oil and Gas Co. v. National Transit Co.*, 172 Pa. St. 421; 26 Pittsb. L. J. (N. S.) 314; 37 W. N. C. 473; 33 Atl. Rep. 687.

⁹ *Buckeye Pipe Line Co. v. Fee*, 15 Ohio C. C. 673.

¹⁰ *Johnston v. People's Natural Gas Co. (Pa.)*, 7 Atl. Rep. 167; 5 Cent. Rep. 564; 15 Morr. Min. Rep. 556; *Carother v. Philadelphia Co.*, 118 Pa. St. 468; 12 Atl. Rep. 314; *Bloomfield, etc., Co. v. Richardson*,

63 Barb. 437; *West Virginia, etc., Co. v. Volcanic Oil and Coal Co.*, 5 W. Va. 382; *In re New Rochelle Water Co.*, 46 Hun 525; *Calor Oil & Gas Co. v. Franzell*, 128 Ky. 715; 122 S. W. Rep. 188; *Calor Oil & Gas Co. v. Franzell*, 128 Ky. 715; 109 S. W. Rep. 328; 33 Ky. L. Rep. 98; *Lovett v. West Virginia Central Gas Co.*, 65 W. Va. 739; 65 S. E. Rep. 196; *In re Ohio Valley Gas Co.*, 6 Pa. Dist. Rep. 200; 27 Pittsb. Leg. J. (N. S.) 321.

lature to grant this power to persons engaged in furnishing petroleum and natural gas to the people of this State, and to make no such provisions for those furnishing them to the people of other States. It is sufficient for us to know that under the authorities they possess the power to do so, and that in the exercise of the discretion it possesses it has done so."¹¹ The rights

¹¹ Consumers' Gas Trust Co. v. Harless, 131 Ind. 446; 29 N. E. Rep. 1062; 15 L. R. A. 505; Board v. Indianapolis, etc., Co., 134 Ind. 209; 33 N. E. Rep. 972; Consumers' Gas Trust Co. v. Huntsinger, 14 Ind. App. 156; 42 N. E. Rep. 640; Charleston Natural Gas Co. v. Low, 52 W. Va. 662; 44 S. E. Rep. 410; State v. Toledo, 48 Ohio St. 112; 26 N. E. Rep. 1061; 11 L. R. A. 729; Bloomfield, etc., Natural Gas-light Co. v. Richardson, 63 Barb. 437.

A pipe line laid in ground without the landowner's permission belongs to the landowner. Windfall, etc., Co. v. Tutewiler, 152 Ind. 364; 53 N. E. Rep. 284. See Lovett v. West Virginia Central Gas Co., 65 W. Va. 739; 65 S. E. Rep. 196.

Under a parol license to lay "water mains" the licensee has a right to lay only one main, where only one was contemplated when the license was given. Great Falls W. Co. v. Great Northern Ry. Co. 21 Mont. 487; 54 Pac. Rep. 963.

No question as to the effect on a defendant gas company of the petitioner piping the gas into a city can be considered in a proceeding to secure a right of way across land leased by others to the defendant gas company; and a lease granting to a gas company the exclusive right to lay pipe lines across the lessor's land is void, because against public policy, in so far as it excludes others from crossing the tract, and gives rise to no legal rights. In taking land for a right of way across land the gas company seeking it must pay its "market value," which is a sum, the owner who desires to sell it, but not compelled to do so, would take for it in its present condition, and what a purchaser, who is not compelled to buy it, and not compelled to have it, would give for it under the circum-

stances. This rule applies to an instance of laying a pipe in a highway or along the right of way of a railroad across the defendant's land. Calor Oil & Gas Co. v. Franzell, 128 Ky. 715; 109 S. W. Rep. 328; 33 Ky. L. Rep. 98; Calor Oil & Gas Co. v. Franzell, 128 Ky. 715; 122 S. W. Rep. 188; Calor Oil & Gas Co. v. Withes, 141 Ky. 489; 133 S. W. 210.

A statute providing that lands for gas pipe lines shall not be condemned within a certain distance of a dwelling, but permitting pipes to be laid along a highway, without regard to nearness of dwellings, has no application to the sinking of a well and laying pipes on one's own land, between which and dwellings within that distance there is a highway. Windfall Manufg. Co. v. Patterson, 148 Ind. 414; 47 N. E. Rep. 2; 62 Am. St. Rep. 532; 37 L. R. A. 381.

The fact that only a few persons are being served at the time a right of way for a pipe line is proposed to be taken will not defeat the right of the pipe line company in its application, if the real object is to serve the public. Carnegie Natural Gas Co. v. Swiger, 72 W. Va. 557; 79 S. E. 3; 46 L. R. A. (N. S.) 1073.

The general laws sufficiently protects the right of the public in respect to the services to be rendered and reasonableness of the charges to be made therefor to warrant the taking thereof, for such public use. *Ibid.*

Under a statute authorizing a natural gas company engaged in furnishing gas to the public, the petition for the condemnation of a tract for a right of way is fatally defective if it only alleges that the real estate sought to be condemned is necessary for its pipe line from its wells to a certain named city.

of the public in the services to be performed by a *pipe line company* are usually sufficiently definite and fixed by general law to warrant the taking of a right of way by the company in eminent domain proceedings.^{11a}

§ 401. Artificial gas companies.—Eminent domain.

Companies for furnishing artificial or manufactured gas seldom possess the power of eminent domain; but there is no doubt that they may be endowed with that power.¹² They are not usually such public corporations as are endowed with the privilege to exercise such a great power. Their property is not exempt from condemnation by a railway company seeking a right of way, as public quasi-public corporations usually are. In one case it was said: "There is nothing in the charter of the gaslight company which entitles it to exemption from the power of eminent domain exercised under the statute, in acquiring real estate. Its land is not held by virtue of any such right; nor is it required to serve any public use which confers upon it any special privilege in this respect. It is a private manufacturing corporation which furnishes gas to individuals and for the lighting of the public streets, on such terms as are agreed upon. This, of itself, does not make it a public corporation. It is not merely public because it has a public character. The land is not now, and has not been, devoted to gas purposes by the company, and it is not clear that it is not absolutely indispensable for their use at the present time. That it may become so hereafter does not necessarily deprive the petitioners of the right to acquire it if the public exigencies require it."¹³

It should show that it is engaged in furnishing gas to the public. If the statute authorizes merely taking an easement, then the petition is defective if it seeks to take the fee. *Great Western, etc., Co. v. Hawkins*, 30 Ind. App. 557; 66 N. E. Rep. 765.

In order to secure a right of way to a city it is not necessary to allege the petition that the petitioner has secured a franchise in the city or that it sold all its gas to another company. *Calor Oil & Gas Co. v. Franzell*, 128 Ky. 715; 109 S. W. 328; 33 Ky. L. Rep. 98.

^{11a} *Carnegie Natural Gas Co. v.*

Swiger, 72 W. Va. 557; 79 S. E. 3; 46 L. R. A. (N. S.) 1073.

¹² *State v. Indiana, etc., Co.*, 120 Ind. 575; 22 N. E. Rep. 778; 29 Am. and Eng. Corp. Cas. 237; 6 L. R. A. 579; *In re East River Gas Co.*, 190 N. Y. 528; 84 N. E. Rep. 1112; affirming 119 App. Div. 350; 104 N. Y. Supp. Rep. 239.

¹³ *New York, etc., R. R. Co. v. Metropolitan Gaslight Co.*, 63 N. Y. 326; 5 Hun 201. See also *Commonwealth v. Lowell Gaslight Co.*, 12 Allen 77.

That an artificial gas company may be endowed with the right of

§ 402. Foreign companies excluded from use of power of eminent domain.

The legislature may authorize domestic companies to exercise the power of eminent domain without extending the right to foreign companies; and the statute conferring such power is not for that reason unconstitutional.¹⁴ A foreign company may, however, be endowed with such power.¹⁵

§ 403. Number of lines that can be laid in right of way acquired.

A gas company having acquired a right of way by the power of eminent domain is not restricted in the size of the pipe it will lay down, nor in the number so long as it keeps upon such right of way.¹⁶

§ 404. Laying pipes in country highways, or on right of way of a railroad.

As a pipe line is an additional burden on the fee of a country highway, a gas or oil company engaged in the transportation of gas or oil must condemn the fee for their use, and also obtain the consent of the proper public officials, before it can lay its pipe lines therein.¹⁷ If a railroad company have an

eminent domain, see *Bloomfield v. Richardson*, 63 Barb. 437.

¹⁴ *Consumers' Gas Trust Co. v. Harless*, 131 Ind. 446; 29 N. E. Rep. 1062; 15 L. R. A. 505.

¹⁵ *In re Ohio Valley Gas Co.*, 6 Pa. Dist. 200; 27 Pittsb. Leg. J. (N. S.) 321; *United Waterworks Co. v. Omaha Water Co.*, 21 N. Y. Misc. 594; 49 N. Y. Supp. 817. See *Cowell v. Colorado Springs*, 100 U. S. 55; *American, etc., Union v. Yount*, 101 U. S. 352; *Watts v. Gantt*, 42 Neb. 869; 61 N. W. Rep. 104; *Carlow v. Aultman*, 28 Neb. 672; 44 N. W. Rep. 873; *Kansas City Natural Gas Co. v. Haskell*, 172 Fed. Rep. 585, affirmed 31 Sup. Ct. 564; 221 U. S. 229; *Haskell v. Coveram*, 187 Fed. 403.

¹⁶ *Dover Gaslight Co. v. Dover*, 7

De G. M. and G. 545; 4 Gas. J. 129, 176; 1 Jur. (N. S.) 812.

A gas company cannot erect a telegraph or telephone line along and on its right of way on the ground that it is necessary to carry on the chief purpose of its incorporation. *Woods v. Greensboro, etc., Gas Co. (Pa.)*, 54 Atl. Rep. 470. See *Gray v. Boston Gaslight Co.*, 114 Mass. 149.

¹⁷ *Board v. Indianapolis, etc., Co.*, 134 Ind. 209; 33 N. E. Rep. 972; *Consumers' Gas Trust Co. v. Huntsinger*, 14 Ind. App. 156; 42 N. E. Rep. 640; *Sterling's Appeal*, 111 Pa. St. 35; 2 Atl. Rep. 105; *Bloomfield, etc., Gas Co. v. Calkins*, 1 T. and C. (N. Y.) 549; *Calkins v. Bloomfield, etc., Gas Co.*, 1 T. and

easement over an owner's land for its right of way, a pipe line cannot be laid in such a right of way without condemning the land and paying the owner for such purpose.^{17a} Where a turnpike company granted to a natural gas company a right-of-way for gas, in consideration of gas to be furnished to the company, its successors or assigns, and the turnpike company afterwards assigned its rights to a street railway company, and the turnpike road was subsequently condemned by the county as a public street, the assignee of the turnpike company was entitled to receive gas from the gas company, under the contract, as long as the gas company maintained its line along the road undisturbed; the taking over of the turnpike company by the county not *ipso facto* terminating the right-of-way regardless of whether the turnpike company owned a fee in the road or had the power to grant a right-of-way beneath the surface.^{17b}

§ 405. Measure of damages, for taking right of way.

The courts will presume that it is a damage to land to conduct a pipe line through it, without any evidence of that fact.¹⁸ In determining the amount of damages, both present and future damages may be recovered.¹⁹ The measure of damages in the appropriation of a right of way is the market value of the land appropriated, and any injury to the residue.²⁰ In the case just cited only an easement was taken, and the court called attention

C. (N. Y.) 541; *Kansas Natural Gas Co. v. Haskell*, 172 Fed. Rep. 585.

In *Bishop v. North Adams Fire District*, 167 Mass. 364, 45 N. E. Rep. 925, it is held that one owning the fee of a highway is not entitled to damages because of a water pipe laid therein.

In England, see *Selby v. Crystal, etc., Gas Co.*, 30 Beav. 606; 11 Gas J. 398; 6 L. T. R. 790; *Footway, Mitcham Gas Co. v. Wimbledon Local Board*, 30 Gas J. 600.

^{17a} *Calor Oil & Gas Co. v. Franzell*, 128 Ky. 715; 109 S. W. Rep. 328; 33 Ky. L. Rep. 98; *Calor Oil & Gas Co. v. Franzell*, 128 Ky. 715; 122 S. W. Rep. 188; *Calor Oil & Gas Co. v. Wither* (Ky.), 133 S. W. 210.

^{17b} *Suburban Rapid Transit St. Ry. Co. v. Monongahela Nat. Gas Co.*, 230 Pa. 109; 79 Atl. 252.

¹⁸ *Indiana Natural Gas and Oil*

Co. v. Jones, 14 Ind. App. 55; 42 N. E. Rep. 487; 12 Nat. Corp. Rep. 60.

¹⁹ *Hyde Park, etc., Co. v. Porter*, 167 Ill. 276; 47 N. E. Rep. 206; affirming 64 Ill. App. 152. This statement, in its effect, must not be extended to prospective damages caused by negligence.

²⁰ *Manufacturers', etc., Co. v. Leslie*, 22 Ind. App. 677; 51 N. E. Rep. 510. The first opinion in this case, as reported in 49 N. E. Rep. 946, was set aside. *Calor Oil & Gas Co. v. Franzell*, 128 Ky. 715, 109 S. W. Rep. 328; 34 Ky. L. Rep.

If the strip sought to be taken has no peculiar adaptability for a pipe line, evidence of the value of the pipe line based on any supposed adaptability for pipe line purposes, is inadmissible; and the owner of the land may not add to the value of his property damages arising from the supposed exhaus-

to the difference where only an easement was taken and where the fee was condemned. "The object, therefore, of the legislature in passing the Act," said the court in the case cited, "we are now considering was to provide land owners a just and adequate compensation for damages incident to construction of pipe lines over and across their lands. Such compensation must be measured by the actual damages to the freehold occasioned by such construction, including the land appropriated and occupied, and the relation of the remaining land thereto."²¹ The amount to be allowed where the line is laid in the public highway is the difference in the market value of the land before and after the construction.²² Damages may be allowed for the inconvenience occasioned by the placing of boxes at a point where another line crosses, and which would not have been necessary but for the construction of such line.²³ But the right of the company to abandon the easement or right of way and remove its pipes cannot, it has been held, furnish a claim for injuries apprehended from its exercise; nor in reducing the amount by reason of the fact that the land owner would, by such abandonment, receive back his land without a burden imposed upon it.²⁴ But this case on appeal was reversed, as indicated below.²⁵

tion of a gas reservoir under his property by the use which the gas company intends to make of its gas wells, because its exhaustion will not arise from the mere fact that the pipe line is laid through his land. *Calor oil & Gas Co. v. J. J. J. J. J.*, 128 Ky. 715; 122 S. W. Rep. 118.

A gas company has no such property right in the location of its pipes and mains, laid under an exclusive franchise to supply gas to the city and its inhabitants, as to make the imposition upon it of the cost of changes in the location of such pipes and mains, necessitated by the construction of the municipal drainage system authorized by Act La. July 9, 1896, a taking of property without due compensation. *Judgment* (1903) 35 So. 929, 111 La. 838, affirmed. *New Orleans Gas-light Co. v. Drainage Commission of New Orleans*, 25 S. Ct. 471, 197 U. S. 453, 49 L. Ed. 831.

Natural gas reduced to possession cannot be taken without compensation. *Kansas Natural Gas Co. v.*

Haskell, 172 Fed. Rep. 545; *Haskell v. Cowan*, 187 Fed. 403.

²¹ *Indiana, etc., Co. v. Jones*, 14 Ind. App. 55; 42 N. E. Rep. 487; 12 Nat. Corp. Rep. 60; *Patterson v. People's Natural Gas Co.*, 172 Pa. St. 554; 26 Pittsb. L. J. (N. S.) 260; 37 W. N. C. 422; 33 Atl. Rep. 575; *Newberryport Water Co. v. Newberryport*, 168 Mass. 541; 47 N. E. Rep. 533. Benefits may be considered. *Fisher v. Baden Gas Co.*, 138 Pa. St. 301; 22 Atl. Rep. 29.

²² *Haukey v. Philadelphia Co.*, 5 Pa. Super. Ct. 148; 41 W. N. C. 27.

²³ *McMillan v. Philadelphia Co.*, 1 Pa. Super. Ct. 648; 38 W. N. C. 222.

²⁴ *Clements v. Philadelphia Co.*, 3 Pa. Super. Ct. 14; 39 W. N. C. 299; reversed 184 Pa. St. 28; 41 W. N. C. 321; 28 Pittsb. L. J. (N. S.) 344; 39 L. R. A. 532; 38 Atl. Rep. 1090.

²⁵ Evidence of the effect upon vegetation of escaping gas is admissible, even upon cross examination where the witness has testified that laying pipes through the soil would

§ 406. Damages occasioned by gas company's trespass on land.

Where a gas company commits a trespass upon land, under the claim or assertion of a right to lay a pipe line therein, the measure of damages is not the same as it is in proceedings to condemn a right of way. In such an instance the land owner is entitled to damages for any injury to the land caused by the operation of the pipe line. But he is not entitled, it has been held in Pennsylvania, for destruction of crops caused by escaping gas, if there be no evidence that the pipes are defective or not properly constructed.²⁶

§ 407. Prospective damages for fires and explosions.

Damages cannot be allowed for losses that may possibly be occasioned by fires and explosions. The courts will not presume that gas or oil cannot be safely conducted through proper pipes; and it will not presume that the condemning company will not use proper pipes or conduct its business in a safe manner. Nor will it be presumed that gas or oil will be permitted to escape so as to injure growing crops or trees, or render the region through which it passes unsafe or undesirable to use for living purposes. It will not indulge the presumption that noisome smells will be permitted to escape, to the annoyance of the owner of the lands through which the pipe lines run.²⁷ This is especially true if a statute makes the company liable for damages thus occasioned in the future.²⁸

not injure the land. *Bloomfield, etc., Gas Co. v. Calkins*, 1 T. and C. (N. Y.) 549.

Damages for loss of rifle range, see *Holt v. Gaslight and Coke Co.*, L. R. 7 Q. B. Div. 728; 41 L. J. Q. B. 351; 27 L. T. (N. S.) 442. For injury to arches in street, *Gaslight and Coke Co. v. St. George Vestry*, 42 L. J. (N. S. Q. B.) 50.

²⁶*Patterson v. People's Natural Gas Co.*, 172 Pa. St. 554; 33 Atl. Rep. 575; *Denniston v. Philadelphia Co.*, 161 Pa. St. 41; 28 Atl. Rep. 1007; *Hankey v. Philadelphia Co.*, 5 Pa. Super. Ct. 148; 41 W. N. C. 27.

²⁷*Indiana, etc., Co. v. Jones*, 14 Ind. App. 55; 42 N. E. Rep. 487; *Manufacturers' Gas Co. v. Leslie*, 22 Ind. App. 677; 51 N. E. Rep. 510; *Wolf v. Cincinnati, etc., Co.*, 6 Ohio Dec. 159; *Denniston v. Philadelphia Co.*, 161 Pa. St. 41; 28 Atl. Rep. 1007.

²⁸*Denniston v. Philadelphia Co.*, 1 Super. Ct. (Pa.) 599; 38 W. N. C. 332; 27 Pittsb. L. J. (N. S.) 14. Future prospective leaks in water pipes may be allowed. *Darlington v. Allegheny*, 28 Pittsb. L. J. (N. S.), 381; *McGregor v. Equitable Gas Co.*, 21 Atl. Rep. 13; 139 Pa. St. 230.

§ 408. Removal of pipe line, damages.

In a Pennsylvania case the following rule was laid down concerning damages occasioned by a removal of a pipe line:

“An entry for the purpose of removal stands, however, upon somewhat different grounds. It is not made because of the necessities of transportation, but because they no longer exist. It is, therefore, the duty of the company to make the removal at the time and in the manner best adapted to the purpose, and least harmful to the land owner. It is the duty of the company, upon a surrender of its easement, to fill the trench it has opened so far as to substantially to restore the surface of the land, and its failure to do so is just ground of a complaint. It should make compensation for any actual injury to growing grain or grass, and, if the field be in meadow, for any substantial injury to the turf, beyond the mere opening and filling of the trench in which the pipe lay. Subject, however, to the limitations now indicated, it has the right to enter and remove its pipe without being liable as a trespasser therefor.”²⁹

§ 409. Pipe line crossing right of way of railroad company.

The owner of an easement across or under a railroad track, for the purpose of passing and repassing, cannot give a pipe line company the right to lay its line in his right of way; and if the pipe line company, acting upon a permission given by such owner of the easement, lay its pipe line in his right of way it will be liable to the railroad company in an action of trespass.³⁰ But where the owner of land conveyed a right of way to a railroad company for its railroad, and afterwards discovered gas

²⁹ *Clements v. Philadelphia Co.*, 184 Pa. St. 28; 28 Pittsb. L. J. (N. S.) 344; 41 W. N. C. 321; 38 Atl. Rep. 1090; 39 L. R. A. 532, reversing 3 Pa. Super. Ct. Rep. 14.

A gas pipe laid in the ground without permission of the land owner belongs to such land owner

and cannot be removed. *Windfall, etc., Co. v. Tutewiler*, 152 Ind. 364; 53 N. E. Rep. 284.

³⁰ *United States Pipe Line Co. v. Delaware, etc., Ry. Co.*, 62 N. J. L. 254; 41 Atl. Rep. 759; 42 L. R. A. 572; *Breckanidge v. Delaware, etc., R. R. Co.* (N. J.), 33 Atl. Rep. 800.

on his land beyond the railroad, it was held that he was entitled to a right of way across the company's track for a gas pipe, as a way of necessity.³¹

§ 410. Revocation of license.

A license to erect and maintain a reservoir and pipe line will not be revoked by court of equity, except on the condition that the licensee may remove his improvements, made on the faith of the license, if it can be accomplished without material loss, or if not, that the licensor or his grantor make a just compensation for the loss.^{*31}

§ 411. Route, specifying in petition.—More than one route.

The exact location of a purposed pipe line need not be given by courses and distances in the petition, under the ordinary statute; but it is sufficient to give the size of the pipe, the number of feet it will traverse the land in question, and its approximate direction.³² As a rule, a company can have only one right of way across a tract of land, however convenient another would be.³³

³¹ Uhl v. Ohio River Ry. Co., 47 W. Va. 59; 34 S. E. Rep. 934. See Calor Oil & Gas Co. v. Franzell, 128 Ky. 715; 109 S. W. Rep. 328; 33 Ky. L. Rep. 78; 128 Ky. 715; 122 S. W. Rep. 188.

^{*31} Flick v. Bell, 5 Cal. Unrep. Cas. 206; 42 Pac. Rep. 813.

The covenant in a license for the laying of gas mains along a railroad's right of way, that the license should not be assigned without the written consent of the railroad company, did not apply to a receiver of the license. Lake Erie & W. R. Co. v. Marrott, 52 Ind. App. 332; 100 N. E. 865.

The rights of a licensee laying his pipes in another person's ground will be protected by injunction.

Ralston v. Wichita Natural Gas Co., 81 Kan. 86; 105 Pac. Rep. 430. See also Brookshire Oil Co. v. Casmolia, etc., Co., 156 Cal. 211; 103 Pac. Rep. 927.

³² *In re* Ohio Valley Gas Co., 6 Pa. Dist. Rep. 200; 27 Pittsb. L. J. (N. S.) 321.

³³ McKay v. Pennsylvania Water Co., 6 Pa. Dist. Rep. 364; 27 Pittsb. Leg. J. (N. S.) 406.

If the company does not comply with the statutory requirements in securing a condemnation of a right of way, the courts will not enjoin the land owner from interfering with the laying of its pipe line. Quarryville Water Co. v. Fritz, 14 Lane. L. Rev. 186.

§ 412. Coal mine beneath pipe line.—Support.

The easement of a gas company by eminent domain carries with it the right of support for its lines; and the owner of the coal has no right to remove the coal or other minerals under the lines to their injury or detriment. The right of the owner of the land is subordinate to the superior right of the gas company; and such superior right to the use of the ground appropriated extends to all the mineral underlying the line, including the coal, the removal of which would endanger the safety of the pipes. In such a case it may be shown in evidence in assessing the damages, the character of the soil through which the line will run, the depth the line will be below the surface of the ground, its proximity to the surface of the underlying coal, the danger of the surface falling in when the coal is removed, the probable breaking of the pipe line, and the danger of gas escaping into the mine, for the purpose of showing the general depreciation in the market value of the land through which the pipe line runs. The gas company has a right to the support of its pipe lines, and this is an element to be considered in estimating the extent to which the value of the tract as a whole is affected, though not to estimate the value of the coal supposed to be necessary to remain to afford a support. The fact that the gas company has executed a release of damages that might be occasioned by the removal of the coal does not prevent the owner of the mine recovering compensation for the risk of injuries to the mine in operating it.³⁴ Dangers to the coal mine that might be occasioned by gas escaping into the mine cannot be considered in assessing damages for a right of way; for the law provides a remedy in such a case by an action for damages; and if the mine owner has occasioned a break in the pipes, whereby the gas escapes into the mine, by removing their support, he cannot recover. If the gas company has released a right of support "from the coal or other mineral underlying the surface, then the owner of the coal may mine and remove it as freely and fully as though no entry had been made upon the surface, and for that reason it should not be taken into consideration in adjusting the damages to the landowners;"³⁵ and the element of

³⁴ *Davis v. Jefferson Gas Co.*, 147 Pa. St. 130; 23 Atl. Rep. 218.

139 Pa. St. 230; 21 Atl. Rep. 13; 27 W. N. C. 197.

³⁵ *McGregor v. Equitable Gas Co.*,

possible damages to the pipe line from a subsidence of the surface cannot be considered. Nor can evidence be admitted of a conjectural character as to the opinions of witnesses that there might be a subsidence where the coal is more than one hundred feet below the surface, and therefore it would be necessary to lease coal for a support.³⁶

§ 413. Well pipe passing through coal mine.

A lessee of a coal mine, having only a right to remove the coal, and such rights as are incident thereto, cannot prevent the owner of the surface, or his lessee, drilling a gas well through the stratum of coal to the gas or oil below, whether or not the existence of the oil or gas was known at the time of the lease; and the lessee cannot prevent a use of either the surface or of the earth below the coal stratum. He is not entitled to damages because of the sinking of the shaft.³⁷ Nor will an injunction be granted where the pipes pass through that portion of the mine from which the coal has been removed, even though the charge is that there will be danger from explosions when such danger is denied by counteraffidavits because of the extra precautions that are being used to prevent an explosion. Nor will a preliminary injunction be awarded to prevent the boring where the pipe passes through that portion of the mine excavated, if the remaining coal can be removed without serious interference by other passageways and the owner of the coal can be awarded a judgment for the value of the coal taken out on final hearing.³⁸ Nor will the fact that one or more wells have already been sunk prevent the sinking of other wells, unless positive danger should be occasioned thereby.³⁹

³⁶ *Wallace v. Jefferson Gas Co.*, 147 Pa. St. 205; 23 Atl. Rep. 416. On the same points see *Penn. Gas Coal Co. v. Versailles Fuel Gas Co.*, 131 Pa. St. 522; 19 Atl. Rep. 933.

³⁷ *Chartiers Block Coal Co. v.*

Mellon, 152 Pa. St. 286; 25 Atl. Rep. 597; 18 L. R. A. 702.

³⁸ *Rend v. Venture Oil Co.*, 48 Fed. Rep. 248.

³⁹ *Commonwealth v. Sauters*, 6 Kulp 407. See *Robbins v. Guffey*, 48 Leg. Int. 462.

§ 414. Depth of pipe line.

The contract for a right of way may, of course, specify the depth at which the pipe line shall be laid; but if it does not so specify the landowner cannot insist that it shall be laid at the depth the law does which authorizes the taking of a right of way for a pipe line.⁴⁰

§ 415. Free gas, cutting off, injunction.

Where a landowner, in consideration of receiving natural gas for the premises at a reduced price, granted the right to lay a pipe line through his land, and to construct and operate a telegraph line over his land, the attempt by the gas company, by a mere notice of its intention to maintain its pipe line by the right of eminent domain, and not thereafter supply gas at the price fixed by the contract, was enjoined.⁴¹

⁴⁰ *Clement v. United States Pipe Line Co.*, 253 Pa. 187; 98 Atl. 1070.

⁴¹ *Evans v. American Natural Gas Co.*, 55 Pa. Super. Ct. 116.

CHAPTER XIX.

TRANSPORTATION OF OIL AND GAS.

- § 416. Limit of discussion.
- § 417. Injuries occasioned in transporting oil by reason of defective cars or track.
- § 418. Defective oil tank.—Car.—Remote liability.—Intervening agency.—Crude petroleum not a dangerous agency.
- § 419. Oil shipped on trains carrying other goods.
- § 420. Shipper's liability to servant of carrier.—Naphtha.—Petroleum.—Dangerous agency.
- § 421. Injury to passengers.—Train wreck.
- § 422. Curiosity seekers.—Exploding oil.
- § 423. Allowing oil to escape from pipe line.
- § 424. Inspection of pipe line.
- § 425. Oil illegally stored at railroad station.
- § 426. Storing oil in warehouse.
- § 427. Thief setting oil on fire.

§ 416. Limit of discussion.

In another chapter we have discussed the subject of Eminent Domain as applied to gas and oil pipe lines, and shall not here repeat what was there said; but shall only make use of the few cases there are on the subject of transportation of oil and gas, whether by the ordinary methods of transportation, or by railroad or water, or by pipe lines.

§ 417. Injuries occasioned in transporting oil by reason of defective cars or track.

A railway company or common carrier may be liable for injuries to property adjacent its right of way occasioned by the use of improper cars, or by allowing its track to become out of repair whereby a train is derailed, oil tanks it is carrying are bursted open, the oil set afire, the oil reaching adjacent property and setting it on fire. Thus where a railroad employe, charged with the duty of loading two tank cars with oil from an adjacent

reservoir, uncoupled the cars in order to move the one filled along the track to make room for the other one, when, by reason of a defective brake on it, it got away, ran down the track a mile, collided with a locomotive, burst the tank, set the oil on fire, which spread to property adjoining the right of way, which was burned down, the railroad company was held liable, for the reason that the brake was defective, and if a good one had been upon it the car would not have got away and there would have been no collision. It was considered that the railroad company's servant was in charge of both cars, and whatever he did was the act of the company.¹ So where an oil train was derailed by reason of a defective track, the tanks bursted, the oil set on fire, which spread to adjoining property, the railroad company was held liable, the court saying:

"The cases cited in the original opinion, as well as the authorities relied on by appellant, by reason and analogy, support the proposition that where a railroad company negligently and carelessly runs a heavy freight train, consisting, in part, of several cars of oil, over a defective and unsafe track, through a city, in the night, at a high and dangerous rate of speed, to wit: thirty-five miles an hour, in violation of an ordinance, it is guilty of a positive wrong, and not a mere passive negligence, and is liable for the loss sustained by the burning of the property of the adjacent land owner, occasioned through the wrecking of the train and the consequent flowing and burning of the oil, as the proximate and natural result of such negligence, under the circumstances alleged in the complaint. It was not necessary to aver in the complaint that after the wreck occurred, the company was then and there guilty of any other and additional act of negligence which caused the burning oil to run down hill onto appellee's land. Nothing could have been done after the wreck occurred to prevent such a result. The immediate flowing of the burning oil onto and over appellee's premises, and the consequent burning of her property, was, under the circumstances attending the disaster, inevitable. In other words, in conclusion on this subject, it will suffice to say that

¹ Oil Creek, etc., R. R. Co. v. Keighron, 74 Pa. St. 316.

the wreck of the train, the ignition, explosion and burning of the oil, and the consequent destruction of appellee's property, are shown, by the averments in the complaint, to have been the natural and proximate result of the negligence of appellant." ² But where there was a landslide which covered the track of a railway company, into which an oil train ran, was derailed, the oil tanks were broken open, the oil ignited from the fire in the locomotive and ran down a creek running alongside the track to the plaintiff's property, four hundred feet below, and set it on fire, the railroad company was held not liable; for the reason that it had not been guilty of any negligence, the landslide having occurred but a short time before the wreck, and it being impossible to stop the train between the place it could have been first seen by the engineer and the place where the train was derailed.

"To hold the defendant answerable for this loss," said the court, "would be on the same principle that the defendant would be answerable for all losses occasioned to other persons by reason of the burning oil floating down the current. If that burning oil, thus carried, directly fired bridges, wharves, warehouses and other property, over and along the stream for a great distance, every owner could recover his loss from the defendant, if it is liable to the plaintiffs. If the current of water is not an intervening agency, the cause is proximate; if it is, the cause is remote. The result depends not on time or distance, but on the presence or absence of an intervening agency. Whether the fire be carried by running water over which the defendant has no control, or through its own woodshed, or through the warehouse of another, can make no difference, unless it be held that water is not an intervening agency in carrying and communicating the fire." ³ Where burning oil flowed down from neighboring property upon the defendant's pipe line, causing it to burst and throw a spray of burning oil on the plaintiff's house, thereby burning it down, the defendant was held not liable, for the pipe line was not the proximate cause of the injury. The

² *Lake Erie, etc., R. R. Co. v. Lowder*, 7 Ind. App. 537; 34 N. E. Rep. 447, 747.

³ *Hoag v. Lake Shore, etc., R. R. Co.*, 85 Pa. St. 293; *Chester Nat. Bank v. Southern Pipe Line Co.*, 40 Pa. Super. Ct. 87.

company was not bound to foresee and provide against the bursting of its pipe line.⁴

§ 418. Defective oil tank—car—remote liability—intervening agency. Crude petroleum not a dangerous agency.

The following is a statement of a case decided in the United States Court of Appeals, where a defective oil tank was practically the cause of a very destructive fire, but for which the shipping company was held not liable:⁵

“That in November, 1889, the Standard Oil Company shipped a tank car of crude petroleum containing 6,000 gallons from Lima, Ohio, to the Fort Scott Gas Co. of Fort Scott, Kansas. The tank car had a discharge pipe in the bottom and about the center of the tank some four inches in diameter and projecting about six inches below the bottom. The projection was threaded to receive a heavy cap screw. Within the tank the discharge pipe is fitted with a heavy valve to prevent the escape of oil. The valve rests upon a shoulder in the upper part of the discharge pipe. Below the shoulder there are four concaves made in the valve, to permit the flow of oil upon raising the valve. An inflexible iron rod is attached to the valve, extending through the dome on top of the tank and projecting a foot or more above it. Within the tank at the top there is a coiled wire spring arranged to hold the rod down and keep the rod in position, closing the outlet. To discharge the contents of the car through the lower discharge pipe the cap is unscrewed and the pipe coupling attached. The valve, by means of the rod, is then lifted and the oil permitted to flow through the outlet into the pipe and conducted to the reservoir provided for its reception. The tank car arrived at Fort Scott on the 17th day of November and was received by the consignee on the next day. The gas company caused the car to be removed from the yard of

⁴ Behling v. Southwestern, etc., Pipe Lines, 160 Pa. St. 359; 28 Atl. Rep. 777. The question of negligence in this case was held to be

one for the court and not for the jury.

⁵ Goodlander Milling Co. v. Standard Oil Co., 63 Fed. Rep. 400; 24 U. S. App. 7; 27 L. R. A. 583.

the railroad company, where it was delivered and to be placed on the switch track of another company located on a street a half mile away between the property of the gas company and the steam flour mill of the plaintiff in error. This was done for the purpose of piping the petroleum contained in the tank into the reservoir of the gas company, located beyond the mill and upon the farther side of an intercepting street. The railroad track upon which the tank car stood was three feet distant from the furnace room of the mill, and the latter being three feet below the level of the railroad track at that point. The car was placed directly opposite the furnace room of the mill. On the afternoon of November the 18th before or at the time of the removal of the car on that day, it was observed by the engineer of the switch engine that the tank was leaking, the oil dripping at the outlet of the car and forming a pool on the ground. On the morning of the 19th of November two servants of the gas company undertook to discharge the oil into the reservoir of the gas company, through a pipe laid from the reservoir to the tank car. One of them adjusted the rod at the top of the car and reported to the other that it had been pushed down, indicating the valve to be in proper position. The other went under the car with a wrench to remove the cap and attach the pipe leading to the reservoir. He observed that the cap was loose and removed it with his hand; and it is stated in the brief of the counsel of the plaintiff in error — without reference to the record of verification of the statement — that the man observed as he went under the car for the purpose of removing the cap and attaching the coupling, that the oil was leaking some, but he did not deem that fact of moment, supposing that the valve was in proper position, and would prevent the discharge of petroleum until it was raised. Upon removing the cap, the oil flowed out before the coupling could be attached and despite the efforts made to prevent it and before the car could be removed from its position, the oil flowed down the descent, through an open window, into the boiler room and also upon some hot ashes, located at the rear of the engine room and boiler house, and some eight feet distant from the car and caught fire, whereby the mill and its contents were destroyed and property of the

value of \$107,000 consumed. After the fire and upon examination of the tank, it was discovered that it contained no valve; that it was removed, but how, or when, it is not disclosed by the evidence, but presumably before the tank car was filled with oil for shipment. The evidence established that crude petroleum will give off a vapor or gas which will flash at a temperature of 90 degrees, igniting by contact with fire, and explosive upon its ignition; that it is in common use for fuel purposes; that it is as volatile as turpentine. The action against the Standard Oil Company by the mill owner is predicted upon negligence in omitting to have a proper valve in the outlet of the tank. At the trial of the cause and upon a conclusion of the evidence for the plaintiff, the court directed the jury to find a verdict for the defendant." In passing upon the liability of the Standard Oil Company, the court used the following language:

"We are thus brought to the question whether crude petroleum may properly be classified as a 'dangerous agency within' the meaning of the rule. It is an extensive article of commerce, transported by rail to all parts of the land, shipped by steamers and sail vessels to all parts of the world. It is innocuous of itself. It is dangerous only when in considerable quantity it is brought in contact with fire. It is in general use for fuel and other purposes. It is no more volatile than turpentine, no more explosive than gas; does not necessarily, in handling, involve immediate danger to any one. It is not a dangerous agency in itself, but becomes such by subjection to a high degree of heat or from actual contact with fire. The shipment of such an article of commerce casts upon the shipper a certain duty to the public — that of providing a suitable vehicle for the petroleum in all respects adapted to the purpose of carriage and able to encounter the usual risks of transportation reasonably to be anticipated. We think that to be the true limit of the shipper's duty, and that duty as it appears to us in this case was properly discharged. The petroleum was contained in a tank impervious to fire. The shipment reached its destination in safety. The case is not like that of the shipment of explosives, the character of the shipment being concealed. Here the contents of the tank was declared by the peculiar construction of the car. The prop-

erties of the petroleum were known to the consignee and to the public equally with the defendant. They are matters of common knowledge. There was here no disguise and no concealment.

“ With the knowledge (of the oil leaking) the company placed the car within three feet of the engine and boilers of the mill, located below the grade of the railroad, and with knowledge of the leakage, sufficient, in view of the dangerous proximity of fire, to the place, a careful person, upon diligent inquiry, undertook to discharge the oil in close proximity to hot ashes, and near an open window of the boiler room. We cannot say that the negligent omission of the valve ‘necessarily set the other causes in operation,’ nor can we say that the injury was the natural and probable consequence of the negligent act. In marshalling the probable consequences, which ordinary sagacity should have foreseen as probably resulting from the omission of the valve, it would, as we conceive, appear unlikely and abnormal that this injury should result. We are of the opinion that the intervening and independent act of the gas company was the efficient cause, self-operating, by which the negligent act of the defendant was rendered effective to an injury that was not the probable and natural consequence of the act.”

§ 419. Oil shipped on trains carrying other goods.

If a railroad company ships oil on a train carrying other goods and merchandise, it must take every available precaution against the communication and spread of fire, if it should occur.⁶ It must exercise the same degree of care in handling and transporting combustible oils as is exercised by merchants and insurers in dealing with such articles.⁷

§ 420. Shippers liability to servant of carrier.—Naphtha — petroleum — dangerous agency.

A shipper of naphtha should be careful to so mark the barrels or casks in which it is shipped that it can be readily ascer-

⁶ Empire Transportation Co. v. Wamstta, etc., Co., 63 Pa. St. 14.

⁷ Henry v. Cleveland, etc., R. R. Co., 67 Fed. Rep. 426.

tained what is in such barrels or casks, and thus put the servants of the carriers on their guard, so that they will be able to avoid danger in coming in contact with the oil. Thus where naphtha was put in leaking barrels having white heads, across which was written the words "Unsafe for illuminating purposes," and the naphtha was billed, with other barrels of petroleum, as carbon oil, and an explosion was caused by a servant of the carrier bringing a light too close to the leaking barrels, it was held that the shipper was liable, the words on the barrel heads and in the bill of lading not being enough to apprise those handling the oil of its dangerous character. In this case it was insisted that the servant was guilty of contributory negligence in going into the car with a light; but it was held that the plaintiff could show that he supposed the car was loaded with ordinary oil and prove by a witness that there was no danger in going into a car loaded with such oil, with a light. It was also held that the shippers might show that wooden barrels were safe, and that naphtha was ordinarily shipped in that way by prudent business men; and that it was no defense that the carrier's officers had agreed that the naphtha might be shipped in the manner in which it was put up.⁸ Petroleum, however, is not a dangerous

⁸ Standard Oil Co. v. Tierney, 92 Ky. 367; 17 S. W. Rep. 1025; 14 L. R. A. 677; 13 Ky. L. Rep. 626; Standard Oil Co. v. Tierney, 95 Ky. 633; 96 Ky. 89; 27 S. W. Rep. 983. See Barney v. Burstenbinder, 7 Lans. 210.

Where 75,000 pounds of Fels Naphtha soap was shipped on board a vessel to Liverpool, and was confined in a hold having two four-inch ventilators, the hatch remaining closed during the voyage; and the shipment was made during the summer when the temperature was 60 to 80 degrees Fahrenheit; and on reaching Liverpool, when the stevedores opened the hatch and descended into the hold, a violent explosion took place; and it was shown that naphtha vapor when mixed with air in the proportion of 2 to 5 per cent. forms a highly explosive mixture, when coming in

contact with any igniting substance, it was held that the explosion was caused by the vapor given off by the soap, the evidence disclosing the presence of no other explosive. In this case the boxes were plainly marked "Fels Naphtha Soap," and the carrier was notified that the soap contained naphtha, and that there might be danger of an explosion if it were placed in a confined space; and there was an agreement that the shipment should be stowed in a place where there was a free circulation of air. It was held that the carrier, having knowledge of the character of the commodity shipped, was chargeable with notice of the explosive mixture being formed by the air and naphtha vapor, that fact being one of common knowledge. *International Mercantile Marine Co. v. Fels*, 164 Fed. Rep. 337.

agency within the rule that he who uses it does so at his peril and must respond to injuries thereby occasioned, not caused by external natural consequences or by the interposition of strangers.⁹ No positive duty is imposed on a railway company to examine tanks containing sulphuric acid, in its freight depot, which is awaiting delivery to the consignee, to ascertain if such tank is in good condition; and a failure so to do amounts to nothing more than passive negligence.^{2a}

§ 421. Injury to passengers.—Train wreck.

A freight train carrying two tank cars of naphtha, one of kerosene oil, a car of coke and a caboose, was wrecked, blocking the right of way, and the cars became afire. On the arrival of a passenger train, those in charge of it began transporting the passengers around the wreck to another train on the other side. A gap was opened in the fence along the right of way so that the passengers could be transferred around the fire a safe distance from it, and were transferred in safety to a place beyond the wreck where they were free from danger. The plaintiff, following the direction of the company's officers, passed through the gap, around the fire and burning oil and re-entered through a second gap upon the right of way by passing through the gap in the fence made by such officers so he could reach the place where he was to take the train. After going through this last gap he went back along the railroad track, on the right of way, toward the wreck, although the oil was burning fiercely with a loud noise, and arriving at a point about two-thirds of the distance between the second gap and the wreck, he stood there half an hour watching the fire, when the naphtha and oil exploded, and he was badly burned. When the explosion occurred, the train to carry the passengers had not yet arrived; and the evidence of the company tended to show that its agent had indicated a place where the passengers were to remain until the train that was to carry them had arrived, and that such place was a safe one, and if he had remained there he would not have been injured. It was held that the dangers were so apparent that plaintiff should have avoided the danger; that the railroad company had the right to assume that he would occupy the place

⁹ Cleveland, etc., Ry. Co. v. Balentine, 84 Fed. Rep. 935; 56 U. S. App. 266; 28 C. C. A. 572.

^{2a} Means v. Southern California Ry. Co., 144 Cal. 473; 77 Pac. Rep. 1001. A woman who was injured in

her own house by an explosion of naphtha on the premises of a railroad company 400 feet away from her home, held entitled to damages. Stewart v. Pittsburg C. C. & St. L. Ry. Co., 50 Pa. Super. Ct. 588, 591.

to which he had been conducted and would not expose himself to danger; that it was not bound to restrain him from going near the wreck, that he, at the time of the injury was still a passenger, having a right to complete his journey on the company's cars, and the taking up of the dangerous position near the burning tank might bar him from a right to recover damages for his injuries, but it did not affect his rights as a passenger; that as the company did nothing to invite him to the place of danger, he had to exercise ordinary care for his own safety; that the company was bound to exercise only ordinary care and prudence, and that the question of negligence on the plaintiff's part, as well as on the defendant's, were questions for the jury to determine under proper instructions. A new trial was granted.¹⁰

§ 422. Curiosity seekers.—Exploding oil.

A train of cars was run into oil cars standing on a side track, by reason of a switch having been negligently open, some of the tanks burst, and the oil took fire. At the time the plaintiff was two miles away. He went to the scene of the disaster, on arriving there found the fire burning fiercely, the oil being on fire and making a loud noise like steam escaping from an engine. He went upon the premises of his own free will. The oil ran along the track and set fire to oil tanks that had not been bursted by the collision, and which burst and injured him. Two hours elapsed after the wreck and before the explosion, and the company could have removed the unburst tanks to a place of safety and extinguished the fire. The plaintiff claimed no warning had been given of the danger of exploding tanks; that at the time he was in the exercise of due care for his own safety, and that he was assisting in putting out the fire at the request of one of the servants of the railroad company. The court held that

¹⁰ Conroy v. Chicago, etc., Co., 96 Wis. 243; 70 N. W. Rep. 486; 38 L. R. A. 419.

A railroad company had a contract with a lighting company to supply its cars with gas. While a servant of the lighting company was filling a gas tank on one of the cars of the railroad company's train, on which plaintiff was a passenger, an explosion of the gas occurred, in-

juring the plaintiff. The explosion was occasioned by the failure of the servant to shut off the gas; and this failure was occasioned either by negligence or because of the defective condition of the car valve. It was held that both railroad and the lighting company were liable for the plaintiff's injuries. Chicago & R. I. P. Ry. Co. v. Rhodes, 35 Tex. Civ. App. 432; 80 S. W. Rep. 869.

petroleum only became a dangerous agency when heated; that the plaintiff was not a trespasser, but was engaged in a laudable work; that the company was guilty of negligence in leaving the switch open whereby the collision was occasioned, and also in not stopping the fire or removing the cars to a place of safety so the fire could not reach them, and in not giving a sufficient warning to the injured person, and that if the plaintiff exercised due care and caution he was entitled to recover.¹¹ A companion of the plaintiff was injured, under the same circumstances and conditions, by the same explosion; and his case being appealed he was denied a recovery. The ground of the denial was that "negligence to be actionable, must occur in a breach of a legal duty arising out of a contract or otherwise, or owing to the person sustaining the loss"; and the court defined a "legal duty to be" that which the law requires to be done or forbore to a determinate person, or to the public at large, and as a correlative to a right vested in such persons, or public at large"; that the plaintiff was only a licensee, having no greater rights than a city fireman called to extinguish a fire and entering a burning house; that the negligent act in leaving the switch open was a breach of no duty to the plaintiff, who was two miles distant at the time, and who voluntarily came to the scene; and that the fact he was assisting the servants of the company to put out the fire could not aid him, for the danger was obvious.¹²

¹¹ *Henry v. Cleveland, etc., Ry.*, 67 Fed. Rep. 426.

¹² *Cleveland, etc., Ry. Co. v. Balentine*, 28 C. C. A. 572; 56 U. S. App. 266; 84 Fed. Rep. 935. As to the right of a city fireman injured in a building while extinguishing a fire, see *Gibson v. Leonard*, 143 Ill. 182; 32 N. E. Rep. 182, affirming 37 Ill. App. 344; *Woodruff v. Bowen*, 136 Ind. 431; 34 N. E. Rep. 1113.

A mother and son were injured by the explosion on a railroad car containing naphtha. The evidence of the railroad company was that the mother and son knew for some time that cars containing naphtha were burning, and that they went

into a field out of mere curiosity to see the fire, and while there were injured by the explosion. The evidence on behalf of the mother and son, plaintiffs, was that the son had gone out to look after a cow tethered in or near the field where the injuries were received, and that the mother, becoming anxious over the son's long absence, had gone out to "see what was keeping him." It was held that the question of the plaintiff's contributory negligence was for the jury; and therefore a verdict for the plaintiff should not be set aside. *Morrison v. Pittsburg C. C. & St. L. Ry. Co.*, 26 Pa. Super. Ct. 338.

Plaintiff was walking along a

§ 423. Allowing oil to escape from pipe line.

A pipe line company is bound to safely keep the oil it is transporting in its pipes, and not allow it to escape; and if it does escape, to the damage of another (such as spoiling his well or springs or crops), it is liable in damages for the injury. Such an act is the creation of a nuisance.¹³ It is bound to use great care and to lay and maintain pipes that are safe, and to carefully overlook and inspect them to detect and stop leaks.^{13a} If the breaking of the pipe line could have been prevented, though caused by an extraordinary flood, the owner will be liable for whatever damages the escaping oil causes.^{13b}

§ 424. Inspection of pipe line.

It is the duty of a pipe line company to keep a careful watch over its lines, to detect leaks and imperfections in them and prevent oil escaping. If it do not, its failure to do so may be such negligence on its part as will render it liable. Thus where a contractor putting in a sewer for a city, uncovered a section of an oil pipe line that was empty, and in blasting rock broke it apart at one of its joints, from which two weeks later oil escaped by reason of pumping having been resumed, causing personal injuries resulting in death, the company was held liable on the ground that it had failed to inspect the line for two weeks, at the end of which time the pumping of oil was resumed and continued for a period of two and a half hours when it was notified by the employees at the other end of the line that no oil was flowing.¹⁴

street, on which the ordinary travel had not stopped, 260 feet from where cars in a railroad yard were burning. He was 40 feet above the cars. Naphtha in these burning cars exploded. At the time of the explosion employes of the railroad company and the fire department of the city were working within 30 feet of the cars, trying to extinguish the flames. It was held that the question whether plaintiff was guilty of contributory negligence was one for the jury. *Smith v. Pittsburgh C. C. & St. L. Ry. Co.*, 210 Pa. 345, 349; 59 Atl. Rep. 1077, 1119.

A statement of a bystander made during the fire occasioned by oil escaping from the defendant's oil tank concerning the cause of the ignition, is not admissible for the defendant

as a part of the *res gestae*, *Texas & N. O. R. Co. v. Beller*, 51 Tex. Civ. App. 154; 112 S. W. Rep. 323.

¹³ *Hauk v. Tidewater Pipe Line Co.*, 153 Pa. St. 366; 26 Atl. Rep. 644. See *Clements v. Philadelphia Co.*, 184 Pa. St. 28; 41 W. N. C. 321; 38 Atl. Rep. 1090; 39 L. R. A. 532. See *Lee v. Vacuum Oil Co.*, 54 Hun 156; 7 N. Y. Supp. 426.

^{13a} *Hashman v. Wyandotte Gas Co.*, 83 Kan. 328; 111 Pac. 468.

^{13b} *McMurray v. Prairie Oil & Gas Co.* (Mo. App.), 119 Pac. 463; *Clement v. U. S. Pipe Line Co.*, 253 Pa. 187; 97 Atl. 1070.

¹⁴ *Lee v. Vacuum Oil Co.*, 54 Hun 156; 7 N. Y. Supp. 426; The question of negligence was held to be a proper one for the jury.

§ 425. Oil illegally stored at railroad station.

Oil was stored or permitted to remain at a railroad station in violation of a statute, or rather it had been kept there longer than the statute permitted it to be kept. There were thirty barrels, some full, some partly full and some empty. The platform on which these barrels were standing was about four feet above the ground, old and rotten, had rubbish beneath it, and was soaked with oil. A teamster, not connected with the railroad company, but having a right to go upon the premises, while upon this platform, lighted his pipe with a match and threw down the burning match on the oil soaked boards, from which a fire was started. The fire spread to and burned the property of others. The court, assuming that the company had violated the statute by keeping the oil on the platform longer than the statute allowed it to do so, held that the proximate cause of the injury was the act of the teamster and refused to consider anything back of that act, on the ground that the company could not anticipate that a responsible person would throw a lighted match in the place he did and start a fire. The court also declined to hold that the negligence of the company was concurrent with that of the teamster, for the reason that the negligence of the former preceded that of the latter and was an existing fact when his negligence intervened; and directed a verdict for the defendant.¹⁵

§ 426. Storing oil in warehouse.

Oil of a highly inflammable kind, awaiting shipment, had been stored for two days in a warehouse before the warehouse was set on fire. The warehouse was set on fire without the neglect of the owner; and the fire from it spread to an adjoining warehouse and destroyed it with the greater part of its contents. The owner of the second warehouse sued the owner of the first, claiming that because of the explosion of the oil

¹⁵ *Stone v. Boston, etc., Ry.*, 171 Mass. 536; 51 N. E. Rep. 1; 41 L. R. A. 794.

the fire from the first warehouse was suddenly precipitated upon his warehouse, and that if it had not been for the exploding oil, a greater portion of the contents of his warehouse would have been removed before the fire, which was burning in the warehouse at the time of the explosion, could have extended to his building. The court held that the questions of proximate cause and whether the oil had been in the warehouse for an unreasonable length of time were for the jury, and that the plaintiff might show that the warehouse and its floor were soaked with oil.¹⁶

§ 427. Thief setting oil on fire.

Crude petroleum was carried in a tank on a lighter used in the oil trade. The lighter, with others, lay at a pier, with no watchman on board. It was forced open by a thief, who, in exploring the locker with a lighted match, set fire to the gas or fumes arising from the petroleum, thereby causing an explosion and a fire. The fire destroyed the lighter and another one lying alongside of it. Suit was brought against the owner of the lighter on which the explosion occurred to hold him liable for the destruction of the other lighter; but the court held that he was not liable, for the escape of the gas into the locker was an accident, and the presence of a lighted match in the locker in the hands of a thief was not the natural result of the absence of a watchman.¹⁷ So where a statute made an oil company liable "for all damages occasioned by leakage or the breaking of its pipes," and a pipe broke from which oil spread over land to a mill 800 feet away; and an idler on the scene lighted a cigar and threw the blazing match on the ground which ignited the oil and the fire spread to the mill and burned it down; and under certain conditions of the wind the fire might not have reached the mill, it was held not error to submit to the jury the question whether the escape of the oil was the proximate cause of the burning of the mill.¹⁸

¹⁶ Wright v. Chicago, etc., Ry. Co., 27 Ill. App. 200.

¹⁷ Sofield v. Sommers, 9 Ben. 526; Fed. Cas. No. 13, 157.

¹⁸ Chester Nat. Bank v. Southern Pipe Line Co., 40 Pa. Super. Ct. 87.

CHAPTER XX.

LEGISLATIVE AND MUNICIPAL CONTROL.

- § 428. Gas a dangerous agency.—Police powers.
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- § 468. Same continued.—Rates may be changed.
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§ 428. Gas a dangerous agency.—Police powers.

Gas, and especially natural gas, has always been regarded as a dangerous agency, and must be used with care whenever it comes in contact with property or persons. That it is a dangerous agency is a matter of common knowledge, of which the courts will take judicial notice.¹ It is in a high degree inflammable and explosive. Not only is it dangerous as an explosive, but it is dangerous to life and injurious to herbage, shrubbery and growing trees under certain circumstances. It is in fact as dangerous an agency as gunpowder, which has always been regarded as a proper subject of legislation, even to the extent of excluding it from thickly settled communities. Therefore, under the police powers of a State, it is a proper subject of regulation. "The public safety and welfare," said the Supreme Court of Indiana, "is the highest consideration in all legislation, and to this consideration private rights must yield. No man has a right to so use a dangerous species of property as to put the safety of others in peril. Liberty does not imply

¹ Sec. 41.

the right of one man to so use property as to endanger the property of others, nor does ownership imply any such right. This is rudimental. It must, therefore, be true that the owner of property of such dangerous nature as to require regulations to prevent injury to others can have no right paramount to the police power. It is not too much to say that against the police power there is no such thing as a vested right. If the position of the appellee's counsel is tenable, then after a corporation has invested money in natural gas pipes, machinery and appliances, there can be no subsequent legislation, although the use of the pipes bought might put in peril towns, houses, and even human life along the entire line. The law is subject to no such reproach as a rule like that for which appellees contend would bring upon it. No investment, however great, can so vest a right as to preclude the just exercise of a governmental power such as that under which regulations for the protection of the health and safety of persons are enacted. This principle is supported by many decisions."²

§ 429. Regulating pressure in pipes.

In the exercise of its police power for the protection of life and property, a State may regulate and prescribe the pressure in the gas mains of a company; and it may fix a limit for such pressure even though it has the effect to prevent the conveyance or transportation of gas, as natural gas, beyond the limits of the State, a thing of itself a State cannot prevent. "The pipes for the transportation of the gas," said the Supreme Court of Indiana, "must be laid in our soil; they must cross our farms, pass through our towns, and cross our highways. There are

²Jamieson v. Indiana Natural Gas, etc., Co., 128 Ind. 555; 28 N. E. Rep. 76; 34 Amer. and Eng. Corp. Cas. 1; 12 L. R. A. 652; 3 Interstate Com. Rep. 613; Benedict v. Columbus, etc., Co., 49 N. J. Eq. 23; 23

Atl. Rep. 485; Given v. State 160 Ind. 552; 66 N. E. Rep. 750; La Harpe v. Elm. Tp. Gaslight, etc., Co., 69 Kan. 97; 76 Pac. Rep. 448; Hashman v. Wyandotte Gas Co., 83 Kan. 328; 111 Pac. 468.

many persons, many houses, and much property along the line, within the borders of this State. There is danger to our inhabitants, and to their property from the use of defective or insecure pipes, as well as from an improper use of them. If a volatile, inflammable, and explosive substance, such as natural gas, cannot be conveyed in pipes, under an unsafe pressure, without danger to those whom it is the duty of the commonwealth to protect, then regulation is not unreasonable or illegal in itself. The danger is to our citizens in their own houses, and on their own thoroughfares. It cannot, we suppose, be successfully asserted that a gas company could use pipes of paper, or of spiderwebs, at their pleasure; and yet, if there is no power in the State to regulate the character of the pipes, or the like, this conclusion must result. They, indeed, may do what they please. The danger to be avoided is within the State; the protection of the law ought, upon every principle of justice, to be commensurate with the danger. The legislation is local, is for local protection, and for, presumptively, at least, no other purpose. Gas companies acquire the right to lay pipes by virtue of the power of eminent domain resident in the State, and surely if they take the benefit of our laws, and use our lands and minerals, they must yield obedience to such laws as are framed for the local protection. . . . It seems true beyond fair controversy that the State, by virtue of its inherent power, may provide that pipes shall be laid in trenches, or shall be of sufficient strength to be safe. Otherwise they might be laid on the ground subject to the action of the elements, or be of inadequate strength and thus be fruitful of danger to persons and property. It also seems entirely clear that the State may declare that gas shall not be confined in insufficient tanks or reservoirs, as was done respecting petroleum in States where it is obtained. If it be true that such regulations may be made it must also be true that pressure may be regulated, and that the State must, to a great extent, be judge of the nature and character of the

regulations required. The local character of such a substance as natural gas is, we repeat, marked and peculiar. It is a natural product, and its source is in the soil, or rocks of the earth. It is as strikingly local as coal or petroleum, and yet no one has ever questioned the power of a State to enact laws governing mining. If it be not true that the mining and conveyance of natural gas may be regulated for the protection of persons and property, it may be true that many mining laws are void. Coal oil is subject to inspection and regulation, and so must be natural gas, for it is more dangerous than coal oil. It is so essentially local that only local regulations can be effective or appropriate. It is found in very few localities, and the character of locality is impressed upon it more clearly and strongly than upon almost any other natural product in the world." It was held in pursuance of this line of reasoning, that a statute providing that gas pipes for transporting of natural gas should be tested to at least four hundred pounds pressure to the square inch, and gas "should not be transported in such pipes at a pressure exceeding three hundred pounds per square inch, or otherwise than by the natural pressure of the gas flowing from the wells," was valid; although the effect of this regulation was such that gas could not be transported beyond the State line where the distance it was desired to transport it was a long one.³

³ *Jamieson v. Indiana, etc., Co.*, 128 Ind. 555; 28 N. E. Rep. 76; 34 Am. and Eng. Corp. Cas. 1; 12 L. R. A. 652; 3 Inter. Com. Rep. 613; *Benedict v. Construction, etc., Co.*, 49 N. J. Eq. 23; 23 Atl. Rep. 485; *Manufacturers' Gas and Oil Co. v. Indiana, etc., Co.*, 155 Ind. 566; 58 N. E. Rep. 851; *Manufacturers' Gas and Oil Co. v. Indiana, etc., Co.*, 156 Ind. 679; 59 N. E. Rep. 169. In this last case it was held that an individual cannot maintain an injunc-

tion to prevent an unlawful transportation of gas, unless he suffers an injury peculiar to himself. See also *Richmond Natural Gas Co. v. Enterprise Natural Gas Co.*, 31 Ind. App. 222; 66 N. E. Rep. 782.

A state gas commission cannot require an artificial gas company to furnish gas at such a pressure as to be commercially impossible. *Consolidated Gas Co. v. New York City*, 157 Fed. Rep. 849.

§ 430. Prohibiting transportation of gas beyond the State.

Natural gas is an article of commerce, although not an ordinary article of commerce. While in the earth it is not a commercial commodity; it becomes so only when it ceases to be a part of the real estate and becomes personal property. So far as it is a commercial commodity the State cannot prohibit its transportation to another State by direct legislation; and a statute enacted for that purpose is void, on the ground that it is an infringement of that clause of the Federal Constitution giving Congress the right to regulate commerce between the States.⁴ But this does not prevent a reasonable regulation of the pressure in the pipes, although the effect of such regulation is to prevent the transportation of gas a long distance, and to a very great extent confine its use to the limits of the State.⁵

§ 431. Plugging abandoned wells.—Waste of gas.

A penal statute which requires all wells to be so used as to prevent the escape of gas or oil into the open air, without being confined in pipes "or other safe receptacles for a longer period than two days next after" it has been struck in such wells; requiring all abandoned wells to be plugged in a certain manner; and providing that if the owner does not plug them within the

⁴ *State v. Indiana, etc., Co.*, 120 Ind. 575; 22 N. E. Rep. 778; 29 Amer. and Eng. Corp. Cas. 237; 6 L. R. A. 579; 2 Inter. Com. Rep. 758; *Kansas Natural Gas Co. v. Haskell*, 172 Fed. Rep. 545; affirmed 31 Sup. Ct. 564; 221 U. S. 249; *Haskell v. Cowhan*, 187 Fed. 403. Those two last cases hold that the owner of gas cannot be prevented by legislation from putting his gas into interstate commerce. In them a statute forbidding the crossing of highways with pipe lines was held unconstitutional. *Haskell v. Kansas Natural Gas Co.*, 224 U. S.

217; 32 Sup. Ct. 442; 56 L. Ed. 738.

A statute fixing the price to be charged for natural gas to consumers within the State, is not an unlawful regulation of interstate commerce, although some of the gas supplied is piped from another State. *Manufacturers' L. & H. Co. v. Ott*, 215 Fed. 940.

⁵ *Jamieson v. Indiana, etc., Co.*, 128 Ind. 555; 28 N. E. Rep. 76; 34 Am. and Eng. Corp. Cas. 1; 12 L. R. A. 652; 3 Inter. Com. Rep. 613; *Benedict v. Columbus Construction Co.*, 49 N. J. Eq. 23; 23 Atl. Rep. 485.

two days' limit any owner of lands adjacent to them or in the vicinity may enter and plug them and recover the cost of plugging from their owner, is a valid exercise of the public power; and the State may, in its sovereign capacity, maintain a suit to enjoin waste in violation of such statutes, on the ground that such waste is a nuisance. The court said, in passing on such a statute, that natural gas in the ground was no more the property of the owner, so long as it remained there, than the air or sunshine that floated over such ground; and therefore the claim made that such a statute prohibited the owner of the gas to do with it as he pleased was not well taken. "It is not the use of unlimited quantities of gas," said the court, "that is prohibited, but it is the waste of it that is forbidden. The object and policy of that inhibition is to prevent, if possible, the exhaustion of the storehouse of nature, wherein is deposited an element that administers more to the comfort, happiness, and well being of society than any other of the bounties of the earth. Even if the appellee cannot draw oil from its well without wasting gas, it is not denied that it may draw gas therefrom, and utilize it without wasting the oil. But, even if it cannot draw oil from such wells without wasting gas, and is forbidden by injunction so to do, it is only applying the doctrine that the owner must so use his own property as not to injure others. It may use its wells to produce gas for a legitimate use, and must so use them as not to injure others or the community at large. The continued waste and exhaustion of the natural gas of Indiana through appellee's wells would not only deny to the inhabitants the many valuable uses of the gas, but the State, whose many quasi-public corporations have many millions of dollars invested in supplying gas to the State and its inhabitants, will suffer the destruction of such corporations, the loss of such investments and a source of large revenues. To use appellee's wells as they have been doing, they injure thousands and perhaps millions of the people of Indiana, and the injury, the exhaustion of natural gas, is not only an irreparable one, but it will be a great public calamity. The oil appellee produces is of very small consequence as compared with that

calamity which it mercilessly and cruelly holds over the heads of the people of Indiana. . . . We had petroleum oil more than a third of a century before its discovery in this State, imported from other States, and we could continue to do so if the production of oil should cease in this State. But we cannot have the blessing of natural gas unless measures for the preservation thereof in this State are enforced against the lawless. We therefore conclude that the facts stated in the complaint make a case of a public nuisance which the appellant [the State] has a right to have abated by injunction.”⁶ On appeal this case was affirmed by the Supreme Court of the United States.⁷

⁶ State v. Ohio Oil Company, 150 Ind. 21; 49 N. E. Rep. 809; 47 L. R. A. 627; Given v. State, 160 Ind. 552; 66 N. E. Rep. 750.

⁷ Ohio Oil Co. v. Indiana, 177 U. S. 190; 20 Sup. Ct. Rep. 576.

Such a statute must be strictly construed. Under the Ohio statute it must appear in the petition to recover the penalty given by the statute that the complainant is a resident of the county where the resident of the county where the suit is brought; but such defect must be taken advantage of by special demurrer particularizing such defect. Some act must be shown indicating the defendant's intention to abandon the well. As long as the casing remains in the well, and prevents water from penetrating the oil-bearing rock, the penalty is not incurred; but it is not necessary to aver that the casing has been drawn. State v. Oak Harbor Gas Co., 18 Ohio Cir. Ct. Rep. 751; 4 Ohio Cir. Ct. Dec. 158; affirmed 53 Ohio St. 347; 41 N. E. Rep. 584.

Under a statute declaring it unlawful for any person to turn off any valve belonging to any person furnishing gas to consumers without permission of the owner, the offense is committed by turning off

the valve without reference to the intent of the doer. State v. Moore, 27 Ind. App. 83; 60 N. E. Rep. 955. A statute providing that “it shall be unlawful for any person, firm or corporation having possession, or control, of any natural gas or oil well, whether as contractor, owner, lessee, agent, or manager, to allow or permit the flow of gas or oil from any such well to escape into the open air, without being confined in such well or proper pipe, or other safe receptacle, for a longer period than two days next after gas or oil shall have been struck in such well,” is valid, and is not invalid because of the shortness of the period in which it must be secured. Given v. State 160 Ind. 552; 66 N. E. Rep. 750. Such statute is strictly construed. McDonald v. Corlin, 163 Ind. 432; 71 N. E. Rep. 961; Bailey v. State, 163 Ind. 165; 71 N. E. Rep. 655.

For a construction of the Kentucky statute, see Commonwealth v. Trent, 117 Ky. 34; 77 S. W. Rep. 390; 25 Ky. L. Rep. 1180.

For a construction of the Pennsylvania statute, see Dawson v. Shaw, 28 Pa. Super. Ct. 563; Steelsmith v. Aiken, 14 Pa. Super. Ct. 226.

§ 432. Preventing waste of gas.—Flambeau lights.

The State by statute may prevent the waste of natural gas; and as the burning of gas in flambeau lights, whether in the country or in the city, is a very wasteful method of securing light, it may prohibit its use in that manner, allowing its use in "jumbo" burners enclosed in glass globes or in other ways that are not wasteful. Such a statute does not deprive an individual of his property without due process of law or without just compensation, nor "grant to any citizen, or class of citizens, privileges or immunities which upon the same terms" do "not equally belong to all citizens." "The act," said the court of Indiana, "in no way deprives the owner of the full and free use of his property. It restrains him from wasting the gas to the injury of others, to the injury of the public." The court likened such a statute to one regulating fishing or hunting, which was enacted to prevent unusual destruction of fish or game, and therefore secure their extinction as food products.⁸

§ 433. Waste of gas in operating oil well.

A statute prohibiting the waste of gas is not invalid even though such waste is only incidental to the operation of a well, in order to take out oil; and although such waste is not permitted it cannot be operated. Nor is it invalid even though the value of the gas is trivial compared with the value of the oil that can be taken out of the well by its operation. In fact, though the statute is practically prohibitory, so far in its operation, as to an oil well is concerned, still the statute for that reason is not invalid.⁹

⁸ Townsend v. State, 147 Ind. 624; 47 N. E. Rep. 19; 37 L. R. A. 294; 62 Am. St. Rep. 477.

In an action for damages for wasting natural gas, defendants are not precluded from showing that they did not waste gas by a judgment against them in a prior *action to restrain the wasting of gas*, in which, for the purpose of showing

that they would thereafter waste gas, evidence was introduced that they had theretofore wasted it. Louisville Gas Co. v. Kentucky Heating Co., 111 S. W. 374; 33 Ky. L. Rep. 912.

⁹ Ohio Oil Co. v. Indiana, 177 U. S. 190; 20 Sup. Ct. Rep. 576; State v. Ohio Oil Co., 150 Ind. 21; 49 N. E. Rep. 809; 47 L. R. A. 627; Given v. State, 160 Ind. 552; 66 N. E. Rep. 750.

§ 434. Inspection of oil.—Tests.

There is no doubt that the State has the power to inspect illuminating oil offered for sale, or that will be offered; and to charge the expense of such inspection to its owner.¹⁰ It may prescribe a test for such oil, requiring it to stand a certain reasonable number of degrees of heat without exploding or igniting. Such is only a reasonable regulation for the safety of the inhabitants of the State.¹¹ And there is no doubt that a statute providing for an inspection of oil may exempt oils from inspection inspected in another State under a similar statute.¹² But

¹⁰ *Burkhardt v. Striger*, 24 Ky. L. Rep. 69; 67 S. W. Rep. 270; *Louisiana State Board v. Standard Oil Co.*, 107 La. Ann. 713; 31 So. Rep. 1015; *Red "C" Oil Manufacturing Co. v. Board*, 222 U. S. 380; 32 Sup. Ct. 152; *State v. Bartles Oil Co.*, 132 Minn. 138; 155 N. W. 1035; *Wolff v. Shreveport Gas, etc., Co. (La.)*, 79 So. 789.

¹¹ *Patterson v. Kentucky*, 97 U. S. 501; *Patterson v. Kentucky*, 11 Bush. 311; 21 Amer. Rep. 220; *Standard Oil Co. v. Commonwealth*, 119 Ky. 1; 82 S. W. 970; 83 S. W. 557; 26 Ky. L. Rep. 927, 1187; *Standard Oil Co. v. Commonwealth*, 119 Ky. 75; 82 S. W. Rep. 1020; 26 Ky. L. Rep. 985; *Waters-Pierce Oil Co. v. Desselms*, 212 U. S. 159; 29 Sup. Ct. Rep. 270; 53 L. Ed. —, affirming 18 Okl. 107; 89 Pac. Rep. 212; *Blaco v. State*, 58 Neb. 557; 78 N. W. Rep. 1056; *Commonwealth v. Standard Oil Co.*, 129 Ky. 546; 112 S. W. Rep. 632; 33 Ky. L. Rep. 1074; *Foote v. Fire Department*, 5 Hill 99 (gunpowder); *Williams v. Augusta*, 4 Ga. 509 (gunpowder); *Davenport v. Richmond*, 81 Va. 636 (gunpowder).

Where oil has been properly tested by state officials and the casks marked according to law showing

that it is marketable oil and complies with the statutory test, a dealer in such oil is not responsible for damages occasioned by an explosion of such oil which explosion was occasioned by the fact that it was below the standard required by the statute, unless he received information which would lead a reasonably prudent man to think that the oil he was selling did not correspond with the inspector's brand, when he should have it inspected in order to ascertain if that was the fact. Whether or not he should have called in the state's inspector, under the circumstances, or had an expert make a test, or whether a test by himself with the apparatus he had access to, would be sufficient, is a question for the jury. *Chapman v. Pfarr*, 145 Iowa 196; 122 N. W. Rep. 992.

¹² *In re Robinson*, 28 Tex. App. 511; 13 S. W. Rep. 786. And the statute is not invalid because it excludes some oils which are as safe for use as those which comply with the statutory standard. *Waters-Pierce Oil Co. v. Deselms*, 212 U. S. 159; 29 Sup. Ct. Rep. 270; 53 L. Ed. —, affirming 18 Okl. 107; 89 Pac. Rep. 812.

a city charter authorizing the passage of all ordinances necessary for the trade, commerce, health, and good government of a city, does not authorize the passage of an ordinance requiring vendors of illuminating oils to pay the inspector fees for inspecting the oil.¹³

§ 435. Ordinance regulating storage of oil.

Under a statute authorizing a municipality to regulate and prevent the storage of combustible or explosive material, an ordinance prohibiting the keeping or storing of explosive oils within a distance of one thousand feet of any dwelling, house, store room, building, barn, shed or other like structure, is reasonable and valid, even as applied to a plant in operation

¹³ *Waters-Pierce Oil Co. v. McElroy* (Tex. Cir. App.), 47 S. W. Rep. 272. As to validity of appointment of officers in Alabama, see *State v. McGough*, 118 Ala. 159; 24 So. Rep. 395.

A statute providing that illuminating oils shall be inspected, applies to gasoline, although it must be first transformed into a vapor. *Burkhardt v. Striger*, 24 Ky. Law Rep. 69; 67 S. W. Rep. 270.

A statute prohibiting the sale or offering for sale of illuminating oils with ignition point of less than 130 degrees Fahrenheit, or oil condemned by an authorized inspector and branded unsafe for illuminating purposes does not prohibit the owner mixing it with oils of a higher grade than 130 degrees so as to make a mixture of that number of degrees, and then offering it for sale. *Commonwealth v. Standard Oil Co.*, 129 Ky. 546; 112 S. W. Rep. 632; 33 Ky. L. Rep. 1074.

The legislature may delegate to a state board power to make such rules and regulations for the inspection and testing of oils sold or

offered for sale as they may deem necessary to provide the people of the state with satisfactory illuminating oil. *Red C. Oil Mfg. Co. v. Board*, 172 Fed. Rep. 695; *Chapman v. Pfarr*, 145 Iowa 196; 123 N. W. Rep. 992.

A statute requiring every oil to be inspected which was the product of petroleum and which is intended to be put on the market and sold for illuminating purposes, requires gasoline kept for sale as an illuminant to be inspected; and the fact that no grade of gasoline will bear the statutory test does not exempt it from inspection, if the owner intends to offer it for sale for illuminating purposes. *Blaco v. State*, 58 Neb. 557; 78 N. W. Rep. 1056. (See *Hanson v. Maverick Oil Co.*, 67 N. H. 201.)

In 1875 a legislature provided that the fees of an inspector should be so much per barrel. In 1887 another legislature declared what should be a barrel. It was held that the barrel the legislature had in mind in 1875 was the barrel which controlled when arriving at

before any other buildings were erected in the neighborhood.¹⁴ A statute making it an offense to keep for sale oils for illuminating purposes inflammable at a lower temperature than that fixed therein prohibits an agent for another keeping such oil for sale.^{14a} Authority given a city to regulate the storage of inflammable materials includes authority to prohibit the storage of explosive oils within the city limits;^{14b} and the enforcement of an ordinance having the effect of putting an end to the business of storing explosive oils and rendering valueless certain structures used in connection with the business does not constitute the taking of property without due process of law where the circumstances justifies its adoption as a police regulation.^{14c} A provision in the regulations of the Commissioners of the District of Columbia, that upon application for a permit to store gasoline the application shall be referred to the inspector of buildings and chief engineer of the fire department for examination of the building described therein, who shall examine such building and return the application with their recommendation to the assessor, who shall issue a license to the applicant unless otherwise ordered, is valid; and it cannot be successfully insisted that it is void on the ground that it is an unauthorized delegation of the power conferred upon such commissioners.^{14d} A complaint charging a violation of such regulations by storing and keeping gasoline for sale without a license was held not supported by evidence showing that the accused had a license to conduct the business

the inspector's fees, and not the barrel of 1887. *Due v. Standard Oil Co.*, 2 Tenn. Ch. App. 118. Further as to fees, see *Blaco v. State*, 58 Neb. 557; 78 N. W. Rep. 1056 (fees due although oil condemned).

¹⁴ *Standard Oil Co. v. Danville*, 199 Ill. 50; 64 N. E. Rep. 1110, affirming 101 Ill. App. 65; *Crowley v. Ellsworth*, 114 La. 308; 38 So. Rep. 119; 69 L. R. A. 276.

An ordinance making it unlawful to erect and maintain gas works within certain limits in the city is valid coming within the police pow-

er. *Dobbins v. Los Angeles*, 139 Cal. 179; 72 Pac. Rep. 970.

^{14a} *State v. Boylan*, 79 Conn. 463; 65 Atl. Rep. 595. In this case the evidence was conflicting as to which device or "cups" should be used for testing the inflammability of the oil, and it was held to be a question for the jury which device or cup should be used.

^{14b} *Crowley v. Ellsworth*, 114 La. 308; 38 So. Rep. 1199; 69 L. R. A. 276.

^{14c} *Crowley v. Ellsworth*, *supra*.

^{14d} *District of Columbia v. Weston*, 23 App. D. C. 363.

of storing automobiles, but had been refused a special license for storage and sale of gasoline on the premises, it appearing that he had a permit to store gasoline in a tank underground, half a block away, and from time to time each day, as need be, he took gasoline from the tank for the supply of automobiles in his establishment, which remained there from ten to sixty minutes awaiting the arrival of their owners, who had ordered them ready for use.^{14e} Where an ordinance provided that it should be unlawful to store in the city more than 200 gallons of kerosene in barrels, tanks or cans, unless kept in a fireproof magazine, isolated and located at some place approved by the council, and providing a penalty for its violation, it was held that the establishment of nonisolated storage tanks within the city, having a capacity of 11,000 gallons each, constituted an abatable nuisance as to adjoining property owners.^{14f}

§ 436. Transportation through a municipality.—License.

A municipality may be empowered to regulate the handling of inflammable oils within its boundaries; and ordinances enacted in pursuance of the power thus given are valid. It may even be empowered to exact a license for their storage and transportation. Thus a city ordinance regulating the handling of turpentine, kerosene, benzine, naphtha, coal oil or its products, and lubricating and fuel oils, from wagons or vehicles, on the streets of the city, and requiring a fee for each wagon, was held valid under the power conferred on it by statute to regulate traffic on its streets and sidewalks, to license, tax, regulate, suppress and prohibit peddlers, to make all regulations which might be necessary for the promotion of health, and to pass all ordinances and make all regulations necessary to carry into effect the powers granted to cities. And it was also held that the provisions of the ordinance designed to prevent highly combustible lubricating and fuel oils from being handled on the streets from

^{14e} *Weston v. District of Columbia*, 23 App. D. C. 367.

^{14f} *Texas Co. v. Fisk* (Tex. Civ. App.), 129 S. W. Rep. 188.

A statute providing that every person purchasing gasoline, benzine

or naphtha for use or sale at retail shall keep it only in barrels, red-lettered, is for the benefit of individuals generally. *Molin v. Wisconsin, etc., Co.*, 177 Mich. 524; 143 N. W. 624.

tank wagons in such a way as to be spilled or otherwise allowed to escape on the surface of the streets was a valid exercise of the city's police power.^{14g}

§ 437. Regulating sale of naphtha by United States statute.

Congress cannot legislate upon the sale of naphtha within the States, nor regulate its sale therein.¹⁵

§ 438. Adulteration of oils.

The legislature may make it an offense to adulterate kerosene oil and prevent its sale.^{15a}

§ 439. A charter is a contract.

If a State incorporate a gas company for a particular municipality, or a municipality grant it the right to occupy its

^{14g} *Spiegler v. Chicago*, 216 Ill. 114; 74 N. E. Rep. 718.

Under a power making it unlawful to transport nitroglycerin in any package not having written or printed on it "Nitroglycerin. Dangerous,"—a city may absolutely prohibit the transportation of nitroglycerin in any quantities through the city. *Walter v. Bowling Green*, 26 Ohio Cir. Ct. Rep. 756.

In this Ohio Case it was also held that a fine of \$100 for the first offense was not excessive.

¹⁵ *United States v. Dermitt*, 8 Wall. 41.

Where a statute made it a fine to sell naphtha under any assumed name, and the defendant claimed that the article sold had been combined with chemical agents so as to counteract its explosive qualities as naphtha; it was held that an instruction telling the jury they were to decide whether the article sold

"was substantially naphtha or not" afforded him no ground of complaint. *Commonwealth v. Wentworth*, 118 Mass. 441.

^{15a} *Stowell v. Standard Oil Co.*, 139 Mich. 18; 102 N. W. Rep. 227; 11 Det. Leg. N. 725; *Bartles Oil Co. v. Lynch*, 109 Minn. 487; 124 N. W. Rep. 1; *State v. Holton*, 148 Iowa 724; 126 N. W. Rep. 1125; *Neiman v. Channellane Oil Mfg. Co.*, 112 Minn. 11; 127 N. W. Rep. 394.

A statute prohibiting the sale of adulterated kerosene oil does not prohibit the sale of kerosene oil colored red, unless the coloring in some substantial degree rendered the oil impure or affected its illuminating quality, or rendered it less safe. Whether or not the coloring matter adulterated the oil is a question of fact and not one of law. *Bartles Oil Co. v. Lynch*, *supra*.

Upon an allegation that the oil sold was "adulterated" it may be

streets and supply its inhabitants with gas, a contract is at once created, in the first case between the State and the company, and in the second between the municipality and the company, which is protected by that clause in the Constitution of the United States prohibiting a State from impairing the obligation of a contract.¹⁶ Of course, it must be understood that in granting a gas company a charter the State does not part with its police power to protect its inhabitants in their health and property;¹⁷ and in granting it the right the municipality does not

shown that the adulteration was the result of improper manufacture as well as by admixture after manufacture. A *wholesaler* selling such oil is liable to a customer purchasing it from a retailer if he be injured by its explosion. In an action to recover damages resulting from adulterated oil, an *expert witness* may describe the process of producing kerosene from petroleum, in order to show that gasoline is a lighter product, as tending to show what was the substance sold. It may also be shown that *gasoline* will throw off a vapor at a lower temperature than kerosene of the legal test, and that kerosene of the legal test will not ignite under the conditions shown to have existed, and that if mixed with gasoline or other substance, it might do so. *Stowell v. Standard Oil Co.*, 139 Mich. 18; 102 N. W. 227; 11 Det. Leg. N. 725.

¹⁶ *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; 10 Am. and Eng. Corp. Cas. 689; 6 Sup. Ct. Rep. 252; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683; 6 Sup. Ct. Rep. 265; 10 Am. and Eng. Corp. Cas. 671 (reversing 81 Ky. 263; 1 Am. and Eng. Corp. Cas. 156); *State v. Laeclde Gaslight Co.*, 102 Mo. 472; 22 Am. St. Rep. 789; 34 Am. and Eng. Corp. Cas. 49; 14 S. W. Rep. 974; 15 S. W.

Rep. 383; *Richmond County Gaslight Co. v. Middletown*, 59 N. Y. 228; *Detroit v. Detroit, etc., Co.*, 184 U. S. 368; 22 Sup. Ct. Rep. 410; *Southwestern, etc., Co. v. Joplin*, 113 Fed. Rep. 817; *Russell v. Sebastian*, 233 U. S. 195; 34 Sup. Ct. 195; 58 L. Ed., reversing 163 Cal. 668; 125 Pac. 875; *People v. Union Gas, etc., Co.*, 254 Ill. 395; 98 N. E. 768 (estopped after ten years recognition); *Henderson v. Shreveport, etc., Co.*, 134 La. 39; 63 So. 616; *Cedar Rapids Gas Light Co. v. Cedar Rapids*, 223 U. S. 655; 32 Sup. Ct. 389; 56 L. Ed. 594, affirming 144 Iowa 426; 120 N. W. 966; 138 Am. St. 299; *Kansas City Gas Co. v. Kansas City*, 198 Fed. 500; *Granville v. Crawford, etc., Co.*, 34 Ohio Cir. Ct. 256; *Ex parte Keppelmann*, 166 Cal. 770; 138 Pac. 346; *Portland Ry., etc., Co. v. Portland*, 200 Fed. 890.

¹⁷ *New Orleans Gas Co. v. Louisiana Light Co.*, *supra*; *Jamieson v. Indiana Natural Gas Co.*, 128 Ind. 555; 28 N. E. Rep. 76; 12 L. R. A. 652; 34 Am. and Eng. Corp. Cas. 1; 3 Inter. Com. Rep. 613; *Bath Gaslight Co. v. Claffy*, 74 Hun 638; 26 N. Y. Supp. 287; *Morristown v. East Tennessee, etc., Co.*, 115 Fed. Rep. 304; *Mason v. Ohio, etc., Co.*, 52 W. Va. 183; 41 S. E. Rep. 418; *Rushville v. Rushville Natural Gas*

part with its power to also protect its inhabitants in both their health and property.¹⁸

Co., 164 Ind. 162; 73 N. E. 87; *New York City v. N. Y. Mut. Gaslight Co.*, 120 N. Y. Supp. Rep. 776; *State v. Excelsior Coke and Gas Co.*, 69 Kan. 45; 76 Pac. Rep. 447; *La Harpe v. Elm Tp., etc., Co.*, 69 Kan. 97; 76 Pac. Rep. 448; *New Orleans Gaslight Co. v. Drainage Commission*, 111 La. 838; 35 So. Rep. 929; *Indianapolis v. Consumers' Gas Trust Co.*, 140 Ind. 107; 39 N. E. 433; 49 Am. St. 183; 27 L. R. A. 514; *Westfield Gas, etc., Co. v. Mendenhall*, 142 Ind. 538; 41 N. E. Rep. 1033; *Michigan Telephone Co. v. St. Joseph*, 121 Mich. 502; 80 N. W. Rep. 383; 47 L. R. A. 87; 80 Am. St. 520; *State v. Corrigan, etc., St. R. Co.*, 85 Mo. 263; 55 Am. Rep. 361; *Burlington v. Burlington St. R. Co.*, 49 Iowa 144; 31 Am. Rep. 145; *New Orleans v. Great Southern, etc., Co.*, 40 La. Ann. 41; 3 So. Rep. 533; 8 Am. St. 502; *City R. Co. v. Citizens' St. R. Co.*, 166 U. S. 557; 17 Sup. Ct. Rep. 653; 41 L. Ed. 1114; *Baltimore Trust, etc., Co. v. Mayor*, 64 Fed. Rep. 153.

¹⁸ *Northern Liberties v. Northern Liberties Gas Co.*, 12 Pa. St. 318; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1; 19 S. Ct. Rep. 77; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659; *Butchers' Union, etc., Co. v. Crescent City, etc., Co.*, 111 U. S. 746; 4 Sup. Ct. Rep. 652; *Coates v. Mayor*, 7 Cow. 585; *Mason v. Ohio River R. R. Co.*, 52 W. Va. 183; 41 S. E. Rep. 418.

In the *Walla Walla* case the court said: "The grant of a right to supply gas or water to a municipality and its inhabitants through pipes or mains laid in the street, upon condition of the performance

of its service by the grantee, is the grant of a franchise vested in the State, in consideration of the performance of a public service, and after the performance by the grantee, is a contract protected by the Constitution of the United States against State legislation to impair it."

See *Mason v. Ohio River R. R. Co.*, 52 W. Va. 183; 41 S. E. Rep. 418; *Traverse City Gas Co. v. Traverse City*, 130 Mich. 17; 89 N. W. Rep. 574; *People v. Chicago Gas Trust Co.*, 130 Ill. 268; 22 N. E. Rep. 798; 8 L. R. A. 497; *Wyandotte County Gas v. State*, 231 U. S. 622; 34 Sup. Ct. 226; 58 L. Ed. 404, affirming 88 Kans. 165; 127 Pac. 639; *St. Marys v. Hope Natural Gas Co.*, W. Va. 71; 76 S. E. 841; *Portland Ry., etc., Co. v. Portland*, 200 Fed. 890; *United Fuel Gas Co. v. Commonwealth*, 159 Ky. 34; 166 S. W. 783.

After the right to occupy the streets has been granted and accepted, the municipality cannot require the lighting company to pay compensation for the use of the ground occupied by its poles. *Hot Springs, etc., Co. v. Hot Springs*, 70 Ark. 300; 67 S. W. Rep. 761.

The incorporation of a gas company, either by special act or under the general laws of the state, with power to manufacture and sell gas gives it the implied power to charge and collect reasonable rates for the gas manufactured, and such power forms part of its contract with the State. *Capital City Gaslight Co. v. Des Moines*, 72 Fed. Rep. 829.

If the charter or franchise does not fix the rates to be charged, yet

§ 440. City cannot fix rates without statutory authority.

A city cannot fix the price of gas supplied by a company under a statute merely authorizing it to provide by ordinance reasonable regulations for its supply, distribution and consumption; nor is such a power conferred under a general welfare clause, such as is usually found in municipal charters or statutes concerning the powers of municipalities.¹⁹ Under a power to "regulate" the openings in streets for a gas company's pipes, and the laying of pipes therein, a city cannot regulate the price which the company may charge for gas.^{19a} So under a statute providing merely that a municipality may establish "such regulations" of the business of a gas company as it sees fit, it is not authorized to fix rates to be charged after the company has occupied its streets with its pipes under an ordinance granting it leave to do so.²⁰ There is no doubt of the power of the State to delegate to a municipality the authority to fix the rates.²¹ If a municipality be granted power to fix rates, it

the rates must be reasonable; and whether they are reasonable is a question for the courts. *Vanderberg v. Kansas City Gas Co.*, 126 Mo. App. 600; 105 S. W. Rep. 17; *Madison v. Madison Gas, etc., Co.*, 129 Wis. 249; 108 N. W. Rep. 65; *Phelan v. Boone Gas Co.*, 147 Iowa 626; 125 N. W. Rep. 208.

But no charter to make and sell gas is necessary, the making and selling not being a prerogative of the government. *Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. 242.

¹⁹ *Lewisville Natural Gas Co. v. State*, 135 Ind. 49; 34 N. E. Rep. 702; 21 L. R. A. 734; 43 Am. and Eng. Corp. Cas. 483 (overruling *Rushville v. Rushville Natural Gas Co.*, 132 Ind. 575; 28 N. E. Rep. 853; 38 Am. and Eng. Corp. Cas. 276; 15 L. R. A. 321); *Indianapolis v. Consumers' Gas Co.*, 140 Ind. 107; 39 N. E. Rep. 433; 27 L. R. A. 514; 48 Am. and Eng. Corp. Cas. 151; 49 Am. St. Rep. 183; *Nobles-*

ville v. Noblesville, etc., Co., 157 Ind. 162; 60 N. E. Rep. 1032; *Rushville v. Rushville Natural Gas Co.*, 164 Ind. 162; 73 N. E. Rep. 87.

^{19a} *Mills v. Chicago*, 127 Fed. 731.

²⁰ *In re Pryor*, 55 Kan. 724; 41 Pac. Rep. 958; 29 L. R. A. 398; 49 Am. St. Rep. 280; 12 Am. R. and Corp. Rep. 364. See *Freeport Water Co. v. Freeport*, 180 U. S. 587; affirming 186 Ill. 179; 57 N. E. Rep. 862; *Richmond v. Richmond Natural Gas Co.*, 168 Ind. 82; 79 N. E. Rep. 1031; *Vanderberg v. Kansas City Gas Co.*, 126 Mo. App. 600; 105 S. W. Rep. 17.

The legislature may deprive a city of the power to contract away its governmental power, to fix gas rates. *Wyandotte County Gas Co. v. State*, 231 U. S. 622; 34 Sup. Ct. 226; 58 L. Ed. 404; affirming 88 Kans. 165; 127 Pac. 639.

²¹ *Cleveland Gaslight and Coke Co. v. Cleveland*, 71 Fed. Rep. 610; *Capitol City Light and Coke Co. v.*

cannot limit that power by ordinance, nor in the grant of a franchise where the authority to fix the rates is a general one.^{21a} A power to fix a rate includes authority to prohibit discrimination among patrons, as by lowering rates directly or indirectly by any device which the gas company may adopt.^{21b} The municipality may fix a maximum rate, and leave it to the gas company to furnish gas at a lower rate.^{21c} A statute authorizing a municipality to fix the rate for gas in force when a charter to a gas company is granted, becomes a part of the contract; and the company is bound by the provisions of the statute, even though it does not consent to its provisions.^{21d} Power to fix rates does not give power to enforce fines for discrimination among patrons, even though the franchise forbids

Des Moines, 72 Fed. Rep. 829; Walla Walla v. Walla Walla Water Co., 172 U. S. 1; 19 S. Ct. Rep. 77; People v. Stephens, 62 Cal. 209; Economic Gas Co. v. Los Angeles, 168 Cal. 448; 143 Pac. 717; Gainesville Gas, etc., Co. v. Gainesville, 63 Fla. 425; 58 So. 785; Newark v. Newark Natural Gas & Fuel Co., 3 Ohio App. 383; 35 Ohio Cir. Ct. 94, affirmed in Newark Natural Gas & Fuel Co. v. Newark, 92 Ohio St. 393; 111 N. E. 150; Ft. Smith Light etc., Co. v. Ft. Smith, 202 Fed. 581; Moline v. Moline, etc., Co., 89 Kan. 670; 131 Pac. 1189; Minneapolis Gaslight Co. v. Minneapolis, 123 Minn. 231; 143 N. W. 728.

The California constitution provides that the legislature shall pass laws for the regulation and limitation of charges for services performed and commodities furnished by gas companies; and it also empowers cities to regulate charges of such companies within their respective limits. It is held that the last clause does not require or authorize the legislature to take away the power conferred on cities by the

second clause, nor does its failure to pass the prescribed laws suspend or hold in abeyance the right of cities to regulate gas rates; and until the legislature has acted the right of cities to act exists unhampered, except so far as restricted by general principles or specific powers of the fundamental law. Denninger v. Pomona, 145 Cal. 629; 79 Pac. Rep. 360. A city ordinance fixing minimum rates, passed without legislative authority is not an Act of the State within the Fourteenth Amendment of the Federal Constitution. Portland Ry., etc., Co. v. Portland, 200 Fed. 890.

^{21a} Wyandotte County Gas Co. v. Kansas, 231 U. S. 622; 34 Sup. Ct. 226; 58 L. Ed. 404, affirming 88 Kans. 165; 127 Pac. 639; Ft. Smith Light, etc., Co. v. Ft. Smith, 202 Fed. 581.

^{21b} Economic Gas Co. v. Los Angeles, 168 Cal. 448; 143 Pac. 717.

^{21c} Newark Natural Gas Co. v. Newark, 92 Ohio St. 393; 111 N. E. 150; affirming 3 Ohio App. 383; 35 Ohio Cir. Ct. 94.

^{21d} Ft. Smith, etc., Co. v. Ft. Smith, 202 Fed. 581.

discrimination.^{21e} Rates fixed by the city council are presumed to be fair and reasonable, until the contrary be shown.^{21f}

§ 441. Municipality regulating rates after ordinances granted.

After a municipality has given a gas company the right to occupy its streets, and the company has accepted the grant, there exists a contract between them which the city cannot change, unless it has received the power to do so.²² The incorporation of the company, either by a special act or under the general law, with power to make and sell gas, the power to charge and collect reasonable rates for the gas manufacture is implied, and forms a part of the company's contract with the State.²³ And where a statute was in force authorizing the legislature to amend, change or alter the charter of every corporation; and thereafter the legislature granted a company a charter, authorizing it to lay its pipes and sell gas in certain portions of a certain city, and exempted it from the provisions of the statute authorizing amendments by it to the charters of companies; and

^{21e} *United Fuel & Gas Co. v. Commonwealth*, 159 Ky. 34; 166 S. W. 783.

^{21f} *Minneapolis Gaslight Co. v. Minneapolis*, 123 Minn. 231; 143 N. W. 728; *Newark v. Newark Natural Gas & Fuel Co.*, 3 Ohio App. 383; 35 Ohio Cir. Ct. 94; affirmed 92 Ohio St. 393; 111 N. E. 150.

²² *Indianapolis v. Consumers', etc., Co.*, 140 Ind. 107; 39 N. E. Rep. 433; 48 Am. and Eng. Corp. Cas. 151; 27 L. R. A. 514; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683 (reversing 81 Ky. 263); 6 Sup. Ct. Rep. 265; 10 Am. and Eng. Corp. Cas. 271; *People v. Chicago Gas Trust Co.*, 130 Ill. 268; 22 N. E. Rep. 798; 8 L. R. A. 497; 29 Am. and Eng. Corp. Cas. 257; *New Orleans Gas Co. v. Louisiana Gas Co.*, 115 U. S. 650; 6 Sup. Ct.

Rep. 252; 10 Am. and Eng. Corp. Cas. 689; *Richmond County Gaslight Co. v. Middletown*, 59 N. Y. 228; *East Ohio Gas Co. v. Akron*, 81 Ohio St. 33; 90 N. E. Rep. 40; *Rushville v. Rushville Natural Gas Co.*, 164 Ind. 162; 73 N. E. Rep. 87; *Noblesville v. Noblesville Gas, etc., Co.*, 157 Ind. 162; 60 N. E. Rep. 1032; *Mills v. Chicago*, 127 Fed. Rep. 731; *Richmond v. Richmond Natural Gas Co.*, 168 Ind. 82; 79 N. E. Rep. 1031. § 440, note 24b.

²³ *Capital City Gaslight Co. v. Des Moines*, 72 Fed. Rep. 829; *Cleveland Gaslight and Coke Co. v. Cleveland*, 71 Fed. Rep. 610; 35 Ohio L. Bull. 155; *Santa Ana Water Co. v. San Buenaventura*, 56 Fed. Rep. 339; *Madison v. Madison Gas, etc., Co.*, 129 Wis. 249; 108 N. W. 65.

several years after the charter was so amended as to extend the rights, privileges and franchises of the company throughout the entire corporate limits of such city, it was decided that the right to make and sell gas carried with it the right to fix the price, and that such right was not subject to regulation either by the city or State. The regulation of the price of gas was considered not an exercise of the police power.²⁴

§ 442. Rates fixed in ordinance granting franchise.

The statement made at the opening of the immediately preceding section is, however, subject to an exception. Thus, if a municipality in granting to a gas company the right to lay its mains in its streets and to supply consumers gas for private use, fix the amount it may charge them, and the company accept the grant or franchise thus given it, either expressly or by implication in occupying the streets pursuant to the ordinance, it cannot exceed the rate thus fixed; and if it attempt to charge more than is allowed in such ordinance, any consumer within the municipality whom it is attempted to overcharge may successfully maintain an action to enjoin such company overcharging him and from removing his meter in order to enforce its unlawful charge.²⁵ "Having accepted the franchise granted by the ordinance," said the Supreme Court of Indiana, "and agreed to be bound by the express terms as to the price of gas, and having engaged in the exercise of the privilege under the grant, and so continuing to do it; it is now precluded from successfully refusing to discharge its obligations to the inhabitants of the town, who desire to use its fuel upon the ground that they refuse to pay a price therefor in excess of the maximum rate fixed by the ordinance. The town could not by its

²⁴ State v. Laeledge Gaslight Co., 102 Mo. 472; 14 S. W. Rep. 974; 15 S. W. Rep. 383; 22 Amer. St. Rep. 789; 34 Am. and Eng. Corp. Cas. 49; People v. Kent (Ill.), 12 Nat. Corp. Rep. 193; Noblesville v. Noblesville Gas, etc., Co., 157 Ind. 162; 60 N. E. Rep. 1032; Mills v. Chicago, 127 Fed. Rep. 731.

As to a franchise already granted,

a city cannot be empowered by the legislature to regulate the rates to be charged for gas. Richmond v. Richmond Natural Gas Co., 169 Ind. 82; 79 N. E. Rep. 1031.

²⁵ Westfield Gas, etc., Co. v. Mendenhall, 142 Ind. 538; 41 N. E. Rep. 1033. This case arose under the same statute as did Louisville, etc., Co. v. State, *supra*.

subsequent action impair or restrict the rights granted to, accepted, and exercised by the appellant. Neither will the latter be permitted, under the circumstances, to decline to comply with the terms or conditions assumed by which it is expressly granted."²⁶ In a subsequent case the same court said: "That the city had no power to regulate the rates of its licensee makes no difference. It had the power to contract. And the power to regulate the governmental function, and the power to contract for the same end, are quite different things. One requires the consent only of the one body, the other the consent of two. In this instance the city acted in the exercise of its power to contract, and it is therefore entitled to the benefits of its bargain."²⁷ In an ordinance granting a gas company the right

²⁶ Citing *Indianapolis v. Consumers', etc., Co.*, 140 Ind. 107; 39 N. E. Rep. 433; 27 L. R. A. 514; 48 Amer. and Eng. Corp. Cas. 151. In the case from which the quotation is made the gas company had given a bond to the town agreeing to comply with the ordinance granting it the right to occupy its streets; and it was a part of such ordinance that the company, in consideration that the town had waived its right to exact a fee for the use of its streets, would adhere to the charges fixed in it for private consumers.

²⁷ *Noblesville v. Noblesville, etc., Co.*, 157 Ind. 162; 60 N. E. Rep. 1032; *Sewickley School District v. Ohio Valley Gas Co.*, 154 Pa. St. 539; 24 Atl. Rep. 868; *Newark Gas and Fuel Co. v. Newark*, 7 Ohio N. P. 76; *Toledo v. N. W. Ohio Natural Gas Co.*, 5 Ohio C. C. 557; 3 Ohio Cir. D. 273; *Logansport, etc., Gas Co. v. Peru*, 89 Fed. Rep. 185; *Richmond v. Richmond Natural Gas Co.*, 168 Ind. 82; 79 N. E. Rep. 1031; *Vanderberg v. Kansas City Gas Co.*, 126 Mo. App. 600; 105 S. W. Rep. 17; *St. Mary's v. Hope Natural Gas Co.*, 71 W. Va. 76; 76 S. W. 841; *Economic Gas Co. v.*

Los Angeles, 168 Cal. 448; 143 Pac. 717; *Henderson v. Shreveport Gas, etc., Co.*, 134 La. 39; 63 So. 616; *Ft. Smith Light, etc., Co. v. Ft. Smith*, 202 Fed. 581; *Wackenhut v. Empire Gas & Electric Co.*, 166 N. Y. Supp. 29; *Kings County Lighting Co. v. New York*, 162 N. Y. Supp. 581; *Farnsworth v. Boro Oil & Gas Co.*, 216 N. Y. 40; 109 N. E. 860, affirming 155 App. Div. 79; 139 N. Y. Supp. 736 (consent to occupy highway obtained from town board instead of commissioners of highway as the law required, and yet company bound); *Newark v. Newark Natural Gas & Fuel*, 3 Ohio App. 383; 35 Ohio Cir. Ct. 94, affirmed 92 Ohio St. 393; 111 N. E. 150; *Gainesville Gas, etc., Co. v. Gainesville*, 63 Fla. 425; 58 So. 785 (ordinance passed over Mayor's veto, and yet valid); *Cedar Rapids*, 223 U. S. 655; 32 Sup. Ct. 389; 56 L. Ed. 594, affirming 144 Iowa 426; 120 N. W. 966; 138 Am. St. 299.

A formal acceptance of the ordinance is not necessary to bind the company where it has enjoyed all the privileges granted it for a term of years during which its charges were made in accordance with the

to occupy its streets, a municipality may require that it furnish gas free to its public buildings, or even to its places of worship; and the company will be bound by its provisions. In such an instance the relation between the municipality and the gas company is one of contract.²⁸

rates prescribed. *Moline v. Moline*, etc., Co., 89 Kan. 670; 131 Pac. 1189.

²⁸*Sewickley School District v. Ohio Valley Gas Co.*, 154 Pa. St. 539; 25 Atl. Rep. 868.

Where a company was granted the exclusive right to the streets of a city, under a condition that it was to furnish free gas to the city so long as it occupied the streets; and the city afterwards granted another company the right to occupy such streets, binding it to have in operation a well connected with pipes within a year, it was held that the latter company did not acquire any rights in the streets until it had fulfilled the condition, and that the first company must continue to furnish free gas until that time. *Newark Gas and Fuel Co. v. Newark*, 7 Ohio N. P. 76; *Toledo v. N. W. Ohio Natural Gas Co.*, 8 Ohio S. and C. P. Dec. 277; 6 Ohio N. P. 531.

A contract to furnish gas service to the city at fixed rates, made with the city is based on sufficient consideration if made in consideration of the city dismissing litigation by the city against the gas company. *Wackenhut v. Empire Gas & El. Co.*, 166 N. Y. Supp. 29.

In fixing rates by ordinance the city cannot impose unlawful conditions in the grant. *Wheeling v. Natural Gas Co.*, 74 W. Va. 372; 82 S. E. 345.

The rate takes effect at the date fixed in the ordinance; and if no

date be fixed therein, then in the manner prescribed by the city's charter or general law for ordinances to take effect. *Minneapolis Gaslight Co. v. Minneapolis*, 123 Minn. 231; 143 N. W. 728.

If a city has reserved the power to regulate the rates to be charged, as incident to such right it may require the gas company to furnish annually such data and information exclusively in their possession as will enable it to fix such rate intelligently. *Cline v. Springfield*, 7 Ohio N. P. 626; 10 Ohio S. & C. P. Dec. 389; *Ex parte Holman (Mo.)*, 191 S. W. 1110 (it is no answer in an investigation of the rates that the city already has the information sought to excuse an examination under oath).

In a case where an ordinance granted a renewal of a franchise on the conditions that the gas company should furnish gas at a certain price with a certain discount to consumers paying before a certain date, it was held not a contract that the price should be kept high enough to allow a discount for prompt payment. *Cedar Rapids Gaslight Co. v. Cedar Rapids*, 223 U. S. 655; 32 Sup. Ct. 389; 56 L. Ed. 594, affirming 144 Iowa 426; 120 N. W. 966; 138 Am. St. 299.

The charter of the city of Detroit confers upon the city the power to control, prescribe, and regulate the manner in which highways, streets, etc., within the city, shall be used and enjoyed, and to provide for and

§ 443. Rates fixed by city in its consent to assignment of franchise right.

If the right to assign a franchise granted a gas company requires the consent of such municipality granting it, then in such consent the municipality may fix the rates the assignee may charge private consumers, without any further or other consideration than that involved in consenting to the assignment.²⁹

regulate the lighting of such places. The act for the organization of gas companies authorizes companies organized thereunder to manufacture and sell gas, to lay gas conductors through the streets, etc., of any city, etc., where the corporation is located or carrying on its business, which conductors are to be laid with the consent of the municipal authorities of such cities, etc., under such reasonable regulations as they may prescribe. It was held that the city of Detroit was not prohibited by the statute from prescribing rates at which gas should be furnished to the inhabitants, but was impliedly authorized thereby to enter into a contract with a gas company prescribing the rates which should be charged. *Boerth v. Detroit City Gas Co.*, 152 Mich. 654; 116 N. W. 628.

A provision in an ordinance granting a renewal of a franchise, to the effect that the company should furnish gas at a certain price with a discount to consumers paying before a certain date, is not a contract that the price should be kept high enough to allow a discount for prompt payment. *Cedar Rapids Gaslight Co. v. Cedar Rapids*, 223 U. S. 655; 32 Sup. Ct. 389; 56 L. Ed. 594, affirming 144 Iowa 426; 120 N. Y. 966; 138 Am. St. 299. An ordinance fixing rates and prohibiting the collection by

rebates, drawbacks, or other device, of a greater or less sum than the rates fixed, prohibits the company from granting a discount to consumers paying their bills at its office on or before a designated day of the month, next succeeding that during which the indebtedness was incurred. *Economic Gas Co. v. Los Angeles*, 168 Cal. 448; 143 Pac. 717.

A municipality may in its own name maintain a suit to restrain a gas company overcharging its customers in violation of the ordinance. *St. Mary's v. Hope Natural Gas Co.*, 71 W. Va. 76; 76 S. E. 840; 43 L. R. A. (N. S.) 994; *Minneapolis Gaslight Co. v. Minneapolis*, 123 Minn. 231; 143 N. W. 728; or the inhabitants of the municipality who use gas may enforce its provisions concerning the rate to be charged though the contract is valid only by force of an estoppel. *Farnsworth v. Boro Oil & Gas Co.*, 216 N. Y. 40; 109 N. E. 860, affirming 155 App. Div. 79; 139 N. Y. Supp. 736; *Pond v. New Rochelle Water Co.*, 183 N. Y. 330; 76 N. E. 211; 1 L. R. A. (N. S.) 958; 5 Ann. Cas. 504.

²⁹ *In re Pryor*, 55 Kan. 724; 41 Pac. Rep. 958; 29 L. R. A. 398; 49 Am. St. 280. See *Noblesville v. Noblesville, etc., Gas Co.*, 157 Ind. 162; 60 N. E. Rep. 1032.

§ 444. Gas company accepting provisions of subsequent ordinance.

A gas company may bind itself by accepting the terms of an ordinance fixing rates passed subsequently to the grant of its franchise; and the right to charge the rates fixed is a sufficient consideration to make its acceptance binding. Thus where a company was occupying the streets of a town under an ordinance that allowed it to charge reasonable rates (by construction), no rate being specified; and no ordinance was enacted specifying what rates the company could charge, but a subsequent ordinance was passed, enumerating and fixing rates for almost all the instances in which the company had been making a charge; and the company accepted the terms of such subsequent ordinance, it was held that it was bound by such acceptance and could charge only the rates specified, except in those instances where no rate was fixed, where it could charge a reasonable rate.³⁰

§ 445. Estoppel to contest rates.

Where a gas company enters upon and occupies the streets of a city under a semblance of, though mistaken, authority, and has entered into an engagement to furnish the inhabitants gas at certain rates, it cannot repudiate the rates thus fixed, for it is estopped to do so.^{30a} So where a gas company had had for several years the benefit of a permit from a city to occupy the streets, it was held estopped to question its liability to the city on the contract, on the ground that its predecessor had made

On an extension of time the city may exact of the company a bond to complete the work within a certain time, and fix upon a specified sum as liquidated damages if it does not complete the work by the time therein agreed upon. *Marshall v. J. W. & W. S. Atkins* (Tex. Civ. App.), 127 S. W. Rep. 1148.

³⁰ *Noblesville v. Noblesville, etc.*, Co., 157 Ind. 162; 60 N. E. Rep. 1032.

Acquiescence in a reduction of

rates for several years for each year, will not prevent contest for a reduction in future years, or in years, in which there has been no acquiescence. *Los Angeles v. Los Angeles City Water Co.*, 177 U. S. 558; 20 Sup. Ct. Rep. 736; 124 Cal. 377.

^{30a} *Farnsworth v. Boro Oil & Gas Co.*, 216 N. Y. 40; 109 N. E. 860; affirming 155 App. Div. 79; 139 N. Y. Supp. 736.

the contract.^{30b} So where a company's franchise specified the rates as so much per fire, and it changed the charge to a meter charge, which change was contested, but sustained, and for thirteen years it furnished gas at the latter rate, it was held that it could not increase the charge without the consent of the town.^{30c}

§ 446. Prohibition to change for specified time.

In some States are statutes authorizing the enactment of an ordinance granting the right of a gas company to supply gas within a certain named period, or not to exceed a certain period of time, and providing on the acceptance of such an ordinance that the acceptance and ordinance shall constitute a contract between the municipality and the gas company. Where such a statute prevails, and such an ordinance is accepted, the rates fixed in it cannot be changed during the period of time fixed in the ordinance.³¹ Under such a statute the time when the period of time shall begin to run may be dated ahead, although the period of time from the enactment of the ordinance until the contract shall expire will exceed the length of time for which the municipality is authorized to bind itself by the contract.³²

§ 447. Police power.—Rates.

But it must be understood that in parting with its power to fix and determine rates neither the State nor the municipality parts with its police power—the power to protect the lives and

^{30b} *Wackenhut v. Empire Gas & El. Co.*, 166 N. Y. Supp. 29.

^{30c} *St. Mary's v. Hope Natural Gas Co.*, 71 W. Va. 76; 76 S. E. 841.

³¹ *Logan Natural Gas, etc., Co. v. Chillicothe*, 65 Ohio St. 186; 62 N. E. Rep. 122; *Cincinnati Gaslight, etc., Co. v. Avondale*, 43 Ohio St. 257; 1 N. E. Rep. 527; reversing 8 Ohio N. P. 88; 11 Wkly. L. Bull. 216; 13 Wkly. L. Bull. 467; 14 Wkly. L. Bull. 15; *State v. Ironton Gas Co.*, 37 Ohio St. 45.

³² *Logan Natural Gas, etc., Co. v. Chillicothe*, *supra*.

A contract for a longer time than the statute allows, or for an indefinite time, will render the time limit of the contract void; and it cannot be urged successfully that it is a contract for the full time allowed by the statute. *Manhattan Trust Co. v. Dayton*, 59 Fed. Rep. 327; 8 C. C. A. 140; 16 U. S. App. 588. There is a seeming conflict between this case and the case of *Toledo v. N. W. Ohio Natural Gas Co.*, 5 Ohio C. C. 557.

the safety of its inhabitants or the safety of its property. It may be said that is a power that neither a State and perhaps a municipality cannot alienate.³³ But the right to exercise the police power is one that must be exercised with due regard to the individual or company affected; under the guise of the right to exercise it, it cannot be so used as to destroy vested rights; and under it the right to regulate a business, it cannot be so used as to confiscate a gas company's business or property without compensation and without due course of law.³⁴

§ 448. Municipality regulating gas companies.

As a municipality is only an agent of the State in its government, the State may delegate to it its rights under the police power to control or regulate a gas company; and no express provision of the constitution is necessary to enable it to do so.³⁵ Under the right delegated to regulate gas companies, however, a municipality may not violate any right granted a company in its charter.³⁶ Nor can the municipality under its power to

³³ *State v. Columbus Gaslight, etc., Co.*, 34 Ohio St. 572; 32 Amer. Rep. 390; *Zanesville v. Zanesville Gaslight Co.*, 47 Ohio St. 1; 23 N. E. Rep. 555; 29 Am. and Eng. Corp. Cas. 190; *Jamieson v. Indiana Nat. Gas, etc., Co.*, 128 Ind. 555; 28 N. E. Rep. 76; 12 L. R. A. 652; 34 Amer. and Eng. Corp. Cas. 1; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; 10 Am. and Eng. Corp. Cas. 639; 6 Sup. Ct. Rep. 252; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683 (reversing 81 Ky. 156; 1 Am. and Eng. Corp. Cas. 156); 6 Sup. Ct. Rep. 265; 10 Am. and Eng. Corp. Cas. 671; *Bath Gaslight Co. v. Claffy*, 74 Hun 638; 26 N. Y. Supp. 287; *Mason v. Ohio River R. R. Co.*, 52 W. Va. 41; 41 S. E. Rep. 418.

³⁴ *New Memphis Gas, etc., Co. v. Memphis*, 72 Fed. Rep. 952; *Benedict v. Columbus Construction Co.*, 49 N. J. Eq. 23; 23 Atl. Rep. 485.

Laws, 1905, c. 736, of New York, fixing price of gas furnished to the city of New York, not being for the general public, is not an exercise of the police power. *Kings County Lighting Co. v. City of New York*, 162 N. Y. S. 581.

³⁵ *Garrison v. Chicago*, 7 Biss. 480; *Indianapolis v. Indianapolis Gaslight, etc., Co.*, 66 Ind. 396; *New Orleans Gaslight Co. v. Hart*, 40 La. Ann. 474; 8 Amer. St. Rep. 544; 4 So. Rep. 215; *Capital City Gaslight Co. v. Des Moines*, 72 Fed. Rep. 829; *Northern Liberties v. Northern Liberties Gas Co.*, 12 Pa. St. 318; *Westfield Gas, etc., Co. v. Mendenhall*, 142 Ind. 538; 41 N. E. Rep. 1033; *Zanesville v. Louisville Gaslight Co.*, 47 Ohio St. 1; 23 N. E. Rep. 55; 29 Am. and Eng. Corp. Cas. 190.

³⁶ *District of Columbia v. Washington Gaslight Co.*, 20 D. C. 39; *Pittsburgh's Appeal*, 115 Pa. St.

regulate a gas company break or impair a contract it has with the company for municipal lighting, or lighting its streets and public highways.³⁷ A municipality has the inherent and implied police power to require all gas companies operating within its limits, to use all reasonable regulations to protect its inhabitants, independent of any statute expressly authorizing it so to do.³⁸ This proposition is emphasized when it is borne in mind that a municipality cannot by contract impair its police power over gas and other like companies, to protect its inhabitants in their health and property from their operations.³⁹

§ 449. Power to change rates.—Rates established must be reasonable.

Where a statute is in force authorizing a municipality to change or regulate rates for gas charged private consumers, the municipality cannot fix the rate so low that the company cannot manufacture and supply gas. The rate must be reasonable; and if not reasonable, the ordinance changing the rate imposes no obligations upon the company.⁴⁰ The granting of a charter to a company to manufacture and supply gas creates an implied contract with the State giving the company the right to charge a reasonable rate for all gas furnished, which cannot be im-

4; 7 Atl. Rep. 778; Northern Liberties v. Northern Liberties Gas Co., *supra*.

³⁷ Capital City Gaslight Co. v. Des Moines, 72 Fed. Rep. 829; Levis v. Newton, 75 Fed. Rep. 884; Indianapolis v. Consumers' Gas Trust Co., 140 Ind. 107; 39 N. E. Rep. 433; 48 Am. and Eng. Corp. Cas. 151; 49 Am. St. Rep. 183; 27 L. R. A. 514; State v. Laclede Gaslight Co., 102 Mo. 472; 14 S. W. Rep. 974; 15 S. W. Rep. 383; 22 Amer. St. Rep. 789; 34 Am. and Eng. Corp. Cas. 49; Indianapolis v. Indianapolis Gaslight, etc., Co., 66 Ind. 396; Gaslight Co. v. South River, 77 N. J. Ch. 487; 77 Atl. Rep. 473.

³⁸ Northern Liberties v. Northern Liberties Gas Co., 12 Pa. St. 318;

Rushville v. Rushville, etc., Gas Co., 132 Ind. 575; 28 N. E. Rep. 853; 15 L. R. A. 321 (overruled on the right to regulate the price of gas); Borough of Edgewood v. Scott, 29 Pa. Super. Ct. 156.

³⁹ East St. Louis v. East St. Louis Gas, etc., Co., 98 Ill. 415; 38 Am. Rep. 97; Meadville Fuel Gas Co.'s Appeal (Pa.), 4 Atl. Rep. 733; 14 Am. and Eng. Corp. Cas. 123; Indianapolis v. Consumers' Trust Co., 140 Ind. 107; 39 N. E. Rep. 483; 49 Am. St. Rep. 183; 48 Am. and Eng. Corp. Cas. 151; 27 L. R. A. 514.

⁴⁰ State v. Cincinnati, etc., Co., 18 Ohio St. 262; Logan Natural Gas, etc., Co. v. Chillicothe, 65 Ohio St. 186; 62 N. E. Rep. 122.

paired.⁴¹ Under such a power a municipality cannot fix a rate so low as to work a practical confiscation of the company's plant; but due regard must be had to the right of the company to receive such an income from its business as will pay operating expenses, legitimate charges, and a reasonable profit.⁴² The reasonableness of the rate fixed is a matter for judicial inquiry;⁴³ and a court of equity has the power to set aside such ordinance and direct the municipality to fix such rates as the statute authorizes.⁴⁴ Before the courts can interfere it must appear that the rates fixed are so plainly and palpably unrea-

⁴¹ Cleveland, etc., Co. v. Cleveland, 71 Fed. Rep. 610; 35 Ohio L. Jr. 155; Toledo v. N. W. Natural Gas Co., 8 Ohio S. and C. P. Dec. 277; Capital City Gaslight Co. v. Des Moines, 72 Fed. Rep. 829; New Memphis Gas Co. v. Memphis, 72 Fed. Rep. 952; Los Angeles v. Los Angeles, etc., Co., 177 U. S. 558; 20 Sup. Ct. Rep. 736; affirming 88 Fed. Rep. 720; Cincinnati, etc., Ry. Co. v. Bowling Green, 57 Ohio St. 336; 49 N. E. Rep. 121; People's Gaslight and Coke Co. v. Chicago, 114 Fed. Rep. 384.

⁴² New Memphis Gas, etc., Co. v. Memphis, 72 Fed. Rep. 952; Wadlington v. Allegheny Heating Co., 6 Pa. Co. Ct. Rep. 96; Spring Valley, etc., Co. v. San Francisco, 82 Cal. 286; 22 Pac. Rep. 910, 1046; San Diego, etc., Co. v. Jasper, 110 Fed. Rep. 702; Indianapolis Gas Co. v. Indianapolis, 82 Fed. Rep. 245; San Joaquin, etc., Co. v. Stanislaus County, 113 Fed. Rep. 930; Madison v. Madison Gas & El. Co., 129 Wis. 249; 108 N. W. Rep. 65; Peoria Gas & El. Co. v. Peoria, 200 U. S. 48; 26 Sup. Ct. Rep. 214; 50 L. Ed. 565; Cedar Rapids Gaslight Co. v. Cedar Rapids, 144 Iowa 426; 120 N. W. Rep. 966; State v. Redding, 84 Kan. 654; 114 Pac. 1094.

If a municipality lease its own

gas works to a company, providing in the lease that its council may fix the rates, but not below the then existing rates, the proviso is a limitation upon its right to regulate rates, and not a mere granting back by the lessee of the right of the municipality in its proprietary capacity only. Los Angeles v. Los Angeles, etc., Co., 177 U. S. 558; 20 Sup. Ct. Rep. 736, affirming 88 Fed. Rep. 720.

⁴³ Capitol City Gas Co. v. Des Moines, 72 Fed. Rep. 829; New Memphis Gas, etc., Co. v. Memphis, 72 Fed. Rep. 952; Agua Pura Co. v. Las Vegas, 10 N. M. 6; 60 Pac. Rep. 208; 50 L. R. A. 224; Vanderberg v. Kansas City Gas Co., 126 Mo. App. 600; 105 S. W. Rep. 17; Lincoln Gas & El. Lighting Co. v. Lincoln, 182 Fed. 926; Ft. Smith Light, etc., Co. v. Ft. Smith, 202 Fed. 581.

⁴⁴ Spring Valley, etc., Co. v. San Francisco, 82 Cal. 286; 22 Pac. Rep. 910, 1086; Osborne v. San Diego, etc., Co., 178 U. S. 22; 20 Sup. Ct. Rep. 860; affirming 76 Fed. Rep. 319; People's Gaslight and Coke Co. v. Hale, 94 Ill. App. 406.

But the court cannot fix the rate, unless empowered so to do by statute. Portland Ry., etc., Co. v. Portland, 200 Fed. 890; Pacific Gas & El. Co. v. San Francisco, 211 Fed. 202.

sonable as to make their enforcement equivalent to the taking of private property for public use without proper compensation.⁴⁵ In discussing this question at great length the Supreme Court of the United States by Justice Harlan has said: "The contention of the appellant [a water company] in the present case is that in ascertaining what are just rates the court should take into consideration the cost of its plant; the cost per annum of operating the plant, including interest paid on money borrowed and reasonably necessary to be used in constructing the same; the annual depreciation of the plant from natural causes resulting from its use; and a fair profit to the company over and above such charges for its services in supplying the water to consumers, either by way of interest on the money it has expended for the public use, or upon some other fair and equitable basis. Undoubtedly, all these matters ought to be taken into consideration, and such weight be given them, when rates are being fixed, as under all the circumstances will be just to the company and to the public. The basis of calculation suggested by the appellant is, however, defective in not requiring the real value of the property and the fair value in themselves of the services rendered to be taken into the consideration. What the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public. The property may have cost more than it ought to have cost, and its outstanding bonds for money borrowed and which went into the plant may be in excess of the real value of the property. So that it cannot be said that the amount of such bonds should

⁴⁵ San Diego, etc., Co. v. Jasper, 111 Fed. Rep. 702. See *People's Gaslight and Coke Co. v. Hale*, 94 Ill. App. 406, and *San Diego, etc., Co. v. San Diego*, 118 Cal. 556; 50 Pac. Rep. 633; 38 L. R. A. 460; 62 Am. St. Rep. 261. In this case three and one-third per cent upon the actual cost of the plant after deducting current expenses was held

to not constitute a just compensation.

A reduction of the company's income need not be shown to establish the fact that the reduction of its rates by ordinance impairs the obligation of a contract prohibiting such reduction. *Los Angeles, etc., Co. v. Los Angeles*, 88 Fed. Rep. 720; affirmed 177 U. S. 558; 20 S. Ct. Rep. 736.

in every case control the question of rates, although it may be an element in the inquiry as to what is, all the circumstances considered, just both to the company and to the public.”⁴⁶ In another case, involving turnpike rates, it was said: “Each case must depend upon its special facts; and when a court, without assuming itself to prescribe rates, is required to determine whether the facts prescribed by the legislature for a corporation controlling a public highway are, as an entirety, so unjust as to destroy the value of its property for all the purposes for which it was acquired, its duty is to take into consideration the interests both of the public and the owner of the property, together with all other circumstances that are fairly to be considered in determining whether the legislature has, under the guise of regulating rates, exceeded its constitutional authority, and practically deprived the owner of property without due process of law. . . . The utmost that any corporation operating a public highway can rightfully demand at the hands of the legislature, when exerting its general powers, is that it receive what under all the circumstances is such compensation for the use of its property as will be just both to it and to the public.”⁴⁷ If the municipality, having the authority to fix rates, do not do so, then the gas company may fix its rates at such a reasonable figure as it sees fit, unless some express provision of a statute or an ordinance prohibit its so doing.⁴⁸ Where a municipality with authority to fix rates does

⁴⁶ *San Diego Land Co. v. National City*, 174 U. S. 739; affirming 74 Fed. Rep. 79. It was also held that the cost of outside ventures could not be considered in determining the rates. *New Memphis Gaslight and Coke Co. v. Memphis*, 72 Fed. Rep. 952. In *St. Louis v. Arnot*, 94 Mo. 275, 7 S. W. Rep. 15, evidence of the cost of the water works was held to be irrelevant in fixing the rates. Nor can expenses of litigation in contesting the validity of an ordinance in fixing the rates be considered. *San Diego Water Co.*

v. San Diego, 118 Cal. 556; 50 Pac. Rep. 633; 38 L. R. A. 460; 62 Am. St. Rep. 261.

⁴⁷ *Covington, etc., Co. v. Sandford*, 164 U. S. 578. See *Chicago, etc., Ry. v. Minnesota*, 134 U. S. 418.

⁴⁸ *Lanning v. Osborne*, 76 Fed. Rep. 319; affirmed *Osborne v. San Diego, etc., Co.*, 178 U. S. 22; 20 Sup. Ct. Rep. 860. In this case it was held that the annual rates as first fixed were not made irrevocable by a contract for the sale of water rights for a fixed sum, providing, in

so, it will be presumed that the rates are reasonable; and the gas company has the burden to show that it is not.⁴⁹ If there be no restriction upon the company in fixing the price, it is authorized to fix it at a reasonable figure;⁵⁰ and the presumption is that the price at which it fixes it is a reasonable one.⁵¹ In a case involving rates, analogous to the rates of a gas company, the Supreme Court of the United States has used the following language: "The judiciary ought not to interfere with the collection of rates established under legislative sanction unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation as under all the circumstances is just to the owner and to the public; that is, judicial interference should never occur unless the case presents clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use."⁵² Under its power to change the rates a municipi-

addition, for the payment of such annual rates to "be fixed by the water company as allowed by law."

Power given to a municipal body to fix rates does not make it a part of the legislative department of the State. *Spring Valley, etc., Co. v. San Francisco*, 82 Cal. 286; 22 Pac. Rep. 910, 1046. See *Lanning v. Osborne*, 82 Fed. Rep. 575.

⁴⁹ *Capitol City Gaslight Co. v. Des Moines*, 72 Fed. Rep. 829. See *State v. Ironton*, 37 Ohio St. 45; *Toledo v. N. W. Ohio Natural Gas Co.*, 3 Ohio Cir. Ct. Dec. 273; 5 Ohio Cir. Ct. 557; *Logansport, etc., Gas Co. v. Peru*, 89 Fed. Rep. 185. That the motives of the common council in fixing the price may be inquired into, see *State v. Cincinnati Gaslight, etc., Co.*, 18 Ohio St. 262.

⁵⁰ *Louisville Gas Co. v. Dulaney*, 100 Ky. 405; 38 S. W. Rep. 703.

⁵¹ *Bellaire Goblet Co. v. Findlay*, 3 Ohio Cir. Dec. 205; 5 Ohio C. C. 418; *Noblesville v. Noblesville Gas, etc., Co.*, 157 Ind. 162; 60 N. E. Rep. 1032.

⁵² *San Diego Land Co. v. National City*, 174 U. S. 739; affirming 74 Fed. Rep. 79; citing *Chicago, etc., Ry. v. Wellman*, 143 U. S. 339; *Reagan v. Farmers' Loan, etc., Co.*, 154 U. S. 362; *Smyth v. Ames*, 169 U. S. p. 524; and *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592; *Cedar Rapids Gaslight Co. v. Cedar Rapids*, 144 Iowa 426; 120 N. W. Rep. 966.

See the following analogous cases: *Chicago, etc., Ry. Co. v. Minnesota*, 134 U. S. 418; *Spring Valley W. W. v. San Francisco*, 82 Cal. 286; 22

pality need not give notice of its intention to do so,⁵³ unless a statute requires it; and this is especially true where the company must furnish data to enable the municipality to determine

Pac. Rep. 910, 1046; Spring Valley W. W. v. Bryant, 52 Cal. 132; Spring Valley W. W. v. Bartlett, 63 Cal. 245; San Diego W. W. Co. v. San Diego, 118 Cal. 556; 50 Pac. Rep. 633; 38 L. R. A. 460; Redlands Domestic Water Co. v. Redlands, 120 Cal. 312; 53 Pac. Rep. 843.

A company is not estopped to contest the validity of an ordinance fixing rates in violation of a contract between the city and the grantors of the company, merely because of fifteen years it has collected the rates established by similarly objectionable ordinances, where it has annually protested against the city's conduct. *Los Angeles v. Los Angeles, etc., Co.*, 177 U. S. 558; 20 Sup. Ct. Rep. 736; affirming 88 Fed. Rep. 720.

A failure of a gas company to furnish gas at a rate specified in an ordinance, upon which condition its charter was granted, is not excused by the passage of a subsequent ordinance for the repeal of the former one. Such a repealing ordinance is nothing more than a wrongful assertion by the town of a right to rescind its contract. *Chicago, etc., Co. v. Lake*, 130 Ill. 42; 22 N. E. Rep. 616; affirming 27 Ill. App. 346.

An ordinance authorizing a company to charge consumers during the continuance of the privilege granted, certain named rates or "other rates that may be established" by the company and approved by the municipal authorities, does not exclude future regulation of the rates charged, in violation of a statute authorizing the municipality to fix the charges. *Creston*

W. W. Co. v. Creston, 101 Ia. 687; 70 N. W. Rep. 739.

In determining whether or not the rates are reasonable, bonds issued for patents not used, cannot be considered. Nor can the rental of land owned by the company but not used as a plant be considered as a proper expense. *Capitol City Gas-light Co. v. Des Moines*, 72 Fed. Rep. 829.

The change of rates so as to impair the original contract raises a question giving the Federal courts jurisdiction. *Logansport, etc., Gas Co. v. Peru*, 89 Fed. Rep. 185.

In determining the rate the municipality may take into consideration the earnings in the past. *Logansport, etc., Gas Co. v. Peru*, 89 Fed. Rep. 185.

The court cannot fix the rate: it can only determine whether or not the rates as fixed by the municipality are reasonable. *People's Gas-light and Coke Co. v. Hale*, 94 Ill. App. 406; *Madison v. Madison Gas, etc., Co.*, 129 Wis. 249; 108 N. W. Rep. 65.

The constitution and statute of California authorizing Boards of Supervisors to fix rates at which water shall be sold by a corporation furnishing water to the public does not apply to a corporation organized to furnish water to its stockholders only. *McFadden v. Los Angeles County*, 74 Cal. 571; 16 Pac. Rep. 397.

⁵³ *Spring Valley, etc., Co. v. San Francisco*, 82 Cal. 286; 22 Pac. Rep. 910, 1046; *Budd v. New York*, 143 U. S. 517; 12 S. Ct. Rep. 468.

what the rates shall be, and it has been called upon by such city, before fixing the rates, to furnish such data.⁵⁴

⁵⁴ *San Diego Land Co. v. National City*, 174 U. S. 739; affirming 74 Fed. Rep. 79.

A water company cannot exact any sum of money or other thing in addition to the legally established rates as a condition upon which it will furnish water. *Lanning v. Osborne*, 76 Fed. Rep. 319.

The current expenses which may be considered in determining the sufficiency of the income provided by water rates consist of the amount of money which is properly and reasonably expended each year in the collection and distribution of water. *San Diego Water Co. v. San Diego*, 118 Cal. 556; 50 Pac. Rep. 633; 38 L. R. A. 460.

Where the water is to be furnished under a contract fixing the rate, the reasonableness of such rates is not a matter of consideration. *Leadville Water Co. v. Leadville*, 22 Colo. 297; 45 Pac. Rep. 362.

The court is not limited to the evidence heard by the municipal board in fixing the rates where the hearing was conducted without notice to the company and without any right on its part to intervene effectually. *San Diego Water Co. v. San Diego*, *supra*. But see *Cedar Rapids Gaslight Co. v. Cedar Rapids*, 144 Iowa 426; 120 N. W. Rep. 966.

In Pennsylvania if the rates yield no more than is required to maintain the plant, pay fixed charges and operating expenses, provide a suitable sinking fund, for the payment of debts, and pay a fair profit to the owners, they are not so unreasonable that the courts will re-

duce them. Under the statute in that State the power of the courts to decrease rates is limited to a reduction of the rates which are specifically charged to be excessive, and does not include the right to form an entirely new schedule of prices covering the company's entire business. *Brymer v. Butler Water Co.*, 179 Pa. St. 331; 27 Pitts. L. J. (N. S.) 285; 39 W. N. C. 439; 36 Atl. Rep. 249; 36 L. R. A. 260.

Under a power reserved to prescribe from time to time rules and regulations for the running and operation of a street railway, a city cannot prescribe the rate of fare. *Detroit v. Detroit, etc., Co.*, 184 U. S. 368; 22 Sup. Ct. Rep. 410; L. Ed.; and the same is true of the price of gas company. *Mills v. Chicago*, 127 Fed. Rep. 731.

Power in a city to secure a reduction in rates by arbitration does not authorize the city itself to change the rate. *Des Moines v. Des Moines W. W. Co.*, 95 Iowa 348; 64 N. W. Rep. 269.

The acceptance by a gas company of the provisions of a city ordinance in which it is reserved the right of the city council to fix the price charged for gas after ten years, the council at the end of the ten-year term may fix the rates, which will be conclusive on both the company and the public, and which cannot be interfered with by the courts in the absence of a showing of fraud or bad faith. *Logansport, etc., Gas Co. v. Peru*, 89 Fed. Rep. 185.

Under a power to fix rates, a city may require a gas company to furnish annually such data and information exclusively in their pos-

§ 450. Rates fixed must be reasonable.—Evidence.

As has been said in the previous section, the rates fixed by a municipality, or other authority having power to do so, must

session as will enable the city to fix the price intelligently. *Cline v. Springfield*, 7 Ohio N. P. 626; 10 Ohio S. & C. P. Dec. 389. In such an instance it is no defence that the city had not exacted reports of other gas companies. *Cline v. Springfield*, *supra*.

The fixing of the rates is a legislative function, and the duty of the court ends when it has determined the rates are not so low as clearly to be confiscatory. *Cedar Rapids Gaslight Co. v. Cedar Rapids*, 144 Iowa 426; 120 N. W. Rep. 966; 138 Am. St. 299, affirmed 223 U. S. 655; 32 Sup. Ct. 389; 56 L. Ed. 594.

A court cannot say that the income of a gas company must necessarily be five per cent. above expenses, including taxes, to avoid the charge of being confiscatory. What compensation is reasonable must be determined in the light of the evidence in each particular case. *Cedar Rapids Gaslight Co. v. Cedar Rapids*, 144 Iowa 426; 120 N. W. Rep. 966; 138 Am. St. 299, affirmed 223 U. S. 655; 32 Sup. Ct. 389; 56 L. Ed. 594.

The gas company cannot evade the ordinance or statute fixing the rates by charging the consumer a meter rent, where the consumer does not consume a minimum amount of gas during a month. *Montgomery Light, etc., Co. v. Walta*, 165 Ala. 370; 51 So. Rep. 726.

The reasonableness of a rate is not to be determined by a mere *mathematical calculation* but, while cost and revenue have no inconsiderable bearing therein, is to an ex-

tent within the flexible limit of judgment. *State v. Public D Service Commission*, 136 Pac. 850; 76 Wash. 492.

A state commission having power to fix rates to be charged by a public service corporation, as a gas or by electric company, must make the rates sufficiently high to yield a fair *return* on the reasonable value of the property *at the time it is being used* for the public. *Bonbright v. Geary*, 210 Fed. 44.

The public service commission, in fixing the rates of a gas company must consider its "*going value*," which is the amount equal to the deficiency of net earnings below a fair return on the actual investment, due solely to the time and expenditures reasonably necessary and proper to the development of the business to its present stage, and not comprised in the valuation of the physical property. *People v. Wilcox*, 104 N. E. 911; 210 N. Y. 479, affirming judgment 141 N. Y. S. 677; 156 App. Div. 603. See also *Des Moines Gas Co. v. Des Moines*, 238 U. S. 153; 35 Sup. Ct. 811; 59 L. Ed. 1244. Modifying decree in 199 Fed. 204; *Public Service Gas Co. v. Board* (N. J. L.), 92 Atl. 1079, affirming 84 N. J. L. 463; 87 Atl. 651.

A municipality, situated near a local natural gas field, considered in connection with the fact that for several years prior citizens thereof had been furnished with gas at a rate not in excess of that prescribed by ordinance, is entitled to a *lower rate*, for gas than the *market value*

be reasonable and not confiscatory. At the risk of repetition

of gas in more distant municipalities. Hence, if at such rate a gas company makes a profit from 8 to 10 per cent. for several years, no confiscatory rate is established. *Newark v. Newark Natural Gas & Fuel Co.*, 111 N. E. 150; 92 Ohio St. 393, affirming 3 Ohio App. 383; 35 Ohio Cir. 94.

In the case of a *natural gas* company, there must be taken into consideration in fixing rates the *diminishing supply* of gas and the consequent *constantly increasing price*, and the necessity for the company to extend its pipe lines into new fields, or the probable short life of the company due to the same fact. *Landon v. Public Utilities Commission*, 234 Fed. 152.

The value of a *special franchise*, not exclusive, should not be considered. *Public Service Gas Co. v. Board* (N. J. L.), 92 Atl. 1079, affirming 84 N. J. L. 463; 87 Atl. 651.

The *present value* of the plant instead of the cost of reproduction or the standard of actual investment must be considered. *Public Service Gas Co. v. Board*, 87 N. J. L. 581; 92 Atl. 606; 94 Atl. 634; 95 Atl. 1079, affirming 84 N. J. L. 463; 87 Atl. 651.

Under Public Utilities Act of New Jersey (P. L. 1911, p. 374), it was held that the *segregation* of a district from the rest of the territory supplied by a public service gas company and fixing a rate based upon its property and earnings in that district alone was in view of the population and the size of the district insuring a large scale production, reasonable and just. *Public Service Gas Co. v. Board* (N. J. L.), 95 Atl. 1079, affirming judg-

ment 87 Atl. 651; 84 N. J. Law 463.

Whether or not the rate is reasonable or unreasonable must be determined from the whole of the evidence. *Ibid.*

For a definition of "overhead charges," as effecting the valuation of the property for the purpose of fixing rates, see *Bonbright v. Geary*, 210 Fed. 44.

The cost of reproduction of *paring* now in the streets, but not in place at the time the mains were laid, cannot be considered in ascertaining the value of the company's plant nor in ascertaining the capital annually expended. *People v. Wilcox*, 210 N. Y. 479; 104 N. E. 911; affirming 156 App. Div. 603; 141 N. Y. Supp. 677; *Des Moines Gas Co. v. Des Moines*, 238 U. S. 153; 35 Sup. Ct. 811; 59 L. Ed. 1244, modifying decree in 199 Fed. 204.

The *annual appreciation of land* cannot be considered. *People v. Wilcox*, *supra*.

Contracts with customers for a higher minimum rate than that fixed by a city having the power to fix rates will not overturn the ordinance so fixing the rate. *Portland Ry., etc., Co. v. Portland*, 200 Fed. 890.

A rate fixed for natural gas by a state commission cannot be held confiscatory because it would require the companies affected, under contracts made by them, to supply gas to consumers in other states at a loss. *Manufacturers' Light & Heat Co. v. Ott*, 215 Fed. 940.

In the *absence* of accurate evidence of *actual value* of a gas plant for rate making, the *cost of repro-*

we state the result of some of the recent cases upon this sub-

duction will be adopted, but there must be a deduction for depreciation. *People v. Wilcox*, 141 N. Y. Supp. 677; 156 App. Div. 603, affirmed 210 N. Y. 479; 104 N. E. 911.

Evidence that other cities of similar population were procuring gas at much less rate than the defendant company is charging is admissible, being some evidence that the defendant's rates are unreasonable *State v. Public Service Commission*, 269 Mo. 525; 191 S. W. 412.

That a gas company, prior to passage of an ordinance fixing gas rates had *voluntarily reduced its rate* to that fixed and continued same for several years, may justify the conclusion that such rate is remunerative. *Newark Natural Gas & Fuel Co. v. Newark*, 111 N. E. 150; 92 Ohio St. 393, affirming judgment of *Newark v. Newark Natural Gas & Fuel Co.*, 3 Ohio App. 383; 35 Ohio Cir. Ct. R. 94.

Where a company affected by an ordinance fixing gas rate is a distributing company only and procures gas from a producing company under a contract not expiring for two years, the effect of the ordinance should be ascertained from conditions then existing, without speculating as to the future production of gas or the cost thereof to the producing company. *Id.*

Where an ordinance as to supplying gas divides the inhabitants of the city into three classes, and the business of a certain inhabitant does not technically fail in any one class, the court will determine to which class he belongs. *Henderson v. Shreveport Gas, Electric Light & Power Co.*, 63 So. 616; 134 La. 39.

Where an ordinance as to supply-

ing gas to inhabitants divides the inhabitants into three classes denominated "domestic consumption," for "public institutions," and "manufacturers," the proprietor of an automobile garage, who used a gas engine to generate electricity to light his building, and to charge electric automobiles and storage batteries, will be placed in the class "manufacturers." *Henderson v. Shreveport Gas, Electric Light & Power Co.*, 63 So. 616; 134 La. 39.

When a court or Public Utilities Commission has fixed a rate the *presumption* is that the court or Utilities Commission acted with due regard to the rights of the consumer and furnisher. *Newark v. Newark Natural Gas & Fuel Co.*, 3 Ohio App. 383; 35 Ohio Cir. Ct. 94, affirmed 92 Ohio St. 393; 111 N. E. 150 (see Sec. 451); and if the gas company deemed the rate unjust it has the *burden* to show its unreasonableness and also to show with reasonable certainty an invasion of its rights. *Ibid.*; *Manufacturers' Light and Heat Co. v. Ott*, 215 Fed. 940.

A state regulation, fixing the price to be charged by gas companies for natural gas furnished to consumers within the state, is not an unlawful regulation of *interstate commerce*, although some of the gas supplied is piped from other states. *Manufacturers' Light & Heat Co. v. Ott*, 215 Fed. 940.

Unless authorized by the court, a receiver is without authority to make any binding contract as to the modification or abrogation of the contract, between the corporation of which he is receiver and a third person. *St. Joseph Gas Co. v. Barker*, 243 Fed. 206.

ject. The rates fixed must not be unreasonable.^{54a} But, "The rates must be plainly unreasonable to the extent that their enforcement would be equivalent to the taking of property for public use without such compensation as under the circumstances is just both to the owner and the public. There must be a fair return upon the reasonable value of the property at the time it is being used for the public."^{54b} In order to de-

^{54a} *Wileox v. Consolidated Gas Co.*, 212 U. S. 19; 29 Sup. Ct. Rep. 192; 53 L. Ed. 382; 48 L. R. A. (N. S.) 1145; 15 Ann. Cas. 1034; reversing 157 Fed. Rep. 849; *Knoxville v. Water Co.*, 212 U. S. 1; 29 Sup. Ct. Rep. 148; 53 L. Ed. 371; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362; 14 Sup. Ct. Rep. 1047; 38 L. Ed. 1031; *Covington, etc., Turnpike Co. v. Sandford*, 164 U. S. 578; 17 Sup. Ct. Rep. 198; 41 L. Ed. 460; *Smyth v. Ames*, 169 U. S. 466; 18 Sup. Ct. Rep. 418; 42 L. Ed. 819; *Stanislaus County v. San Joaquin Co.*, 192 U. S. 201; 24 Sup. Ct. Rep. 241; 48 L. Ed. 406; *Ex parte Young*, 209 U. S. 123; 28 Sup. Ct. Rep. 441; 52 L. Ed. —; *Cedar Rapids Gaslight Co. v. Cedar Rapids*, 144 Iowa 426; 120 N. W. Rep. 966; *State v. Duluth*, 105 Minn. 472; 117 N. W. Rep. 827; *Public Service Corp. v. American Lighting Co.*, 67 N. J. Ch. 122; 57 Atl. Rep. 482; *Erie v. Erie Gas, etc., Co.*, 78 Kan. 348; 97 Pac. Rep. 468; *Saratoga Springs v. Saratoga Gas, etc., Co.*, 191 N. Y. 123; 83 N. E. Rep. 693, reversing 122 N. Y. App. Div. 203; 107 N. Y. Supp. Rep. 341; *Brooklyn Union Gas Co. v. New York City*, 188 N. Y. 334; 81 N. E. Rep. 141, affirming 115 N. Y. App. Div. 69; 110 N. Y. Supp. Rep. 625; *Richman v. Consolidated Gas Co.*, 114 N. Y. App. Div. 216; 100 N. Y. Supp. Rep. 81, affirmed 186 N. Y. 209; 78 N. E. Rep. 871; *Grossman v. Consolidated Gas Co.*, 186 N. Y.

541; 78 N. E. Rep. 871, affirming 114 N. Y. App. Div. 242; 100 N. Y. Supp. Rep. 100; *Brooklyn Union Gas Co. v. N. Y. City*, 50 N. Y. Misc. Rep. 450; 100 N. Y. Supp. Rep. 570; *Lincoln Gas & El. Light Co. v. Lincoln*, 182 Fed. 926.

This is also where a public utilities company fixed the rate—indeed, the statute creating those instrumentalities of regulations, usually in express words, provide that the rates they fix must be "just and reasonable rate." *Landon v. Public Utilities Commission*, 234 Fed. 152; *Public Service Gas Co. v. Board*, 84 N. J. L. 463; 87 Atl. 651, affirmed 87 N. J. L. 581; 92 Atl. 606; 94 Atl. 634; 95 Atl. 1079; *Bonbright v. Geary*, 210 Fed. 44; *State v. Public Service Commission*, 76 Wash. 492; 130 Pac. 850; *St. Joseph Gas Co. v. Barker*, 243 Fed. 206. See § 449, notes.

The constitution of Oklahoma gives power to regulate rates, conferring the power on the legislative commission. *Pawhuska v. Pawhuska Oil & Gas Co. (Okl.)*, 166 Pac. 1058; *Pawhuska Oil & Gas Co. v. Pawhuska*, 47 Okl. 342; 148 Pac. 118; *Guthrie Gas, etc., Co. v. Guthrie (Okl.)*, 166 Pac. 128.

^{54b} Citing *Wileox v. Consolidated Gas Co.*, 212 U. S. 19; 29 Sup. Ct. Rep. 192; 53 L. Ed. 382; 48 L. R. A. (N. S.) 1134; 15 Ann. Cas. 1034; *San Diego Land, etc., Co. v. National City*, 174 U. S. 739; 19 Sup. Ct. Rep. 804; 43 L. Ed. 1154;

termine whether or not the rates are confiscatory, the Supreme Court of the United States, because the constitutionality of a legislative act is involved and from respect due to legislative authority, will not regard the findings of the master and the court below as conclusive, unless unsupported by the evidence or made under erroneous views of the law, and will itself examine the evidence in order to determine whether the rate fixed is confiscatory of the rights of the company.^{54c} The cost of reproduction is not a fair measure of value unless a substantial allowance is made for depreciation, in estimating for rate-fixing purposes the value of the plant. "The items composing the plant depreciate in value from year to year in a varying degree," said the Supreme Court of the United States. "Some pieces of property, like real estate, for instance, depreciate not at all, and sometimes, on the other hand, appreciate in value. But the reservoirs, the mains, the service pipes, structures upon real estate, standpipes, pumps, boilers, meters, tools and appliances of every kind begin to depreciate with more or less rapidity from the moment of their use. It is not easy to fix at any given time the amount of depreciation of a plant whose component parts are of different ages with different expectations of life. But it is clear that some substantial allowance for depreciation ought to have been made in this case."^{54d} Bonds and stocks issued for the purchase and construction of the plant in excess of its cost and by and to parties interested in and controlling the company afford neither a measure nor a guide in valuing it for rate-fixing purposes;^{54e} nor is the court confined to the evidence con-

San Diego Land, etc., Co. v. Jasper, 189 U. S. 439; 23 Sup. Ct. Rep. 571; 47 L. Ed. 892; Cedar Rapids Gaslight Co. v. Cedar Rapids, 144 Iowa 426; 120 N. W. Rep. 966.

^{54c}Knoxville v. Knoxville Water Co., 212 U. S. 1; 29 Sup. Ct. Rep. 192; 53 L. Ed. 371. See Madison v. Madison Gas & El. Co., 129 Wis. 249; 108 N. W. Rep. 65.

^{54d}Knoxville v. Knoxville Water Co., *supra*.

The value of a plant as a "going concern" may be considered in fix-

ing rates. Des Moines Gas Co. v. Des Moines, 238 U. S. 153; 35 Sup. Ct. 811; 59 L. Ed. 1244, modifying decree in 199 Fed. 204; Cedar Rapids Gaslight Co. v. Cedar Rapids, 223 U. S. 655; 32 Sup. Ct. 389; 56 L. Ed. 594, affirming 144 Iowa 426; 120 N. W. 966; 48 L. R. A. (N. S.) 1025; 138 Am. St. 299. See Cedar Rapids Water Co. v. Cedar Rapids, 118 Iowa 224; 91 N. W. 1081. See these cases for a discussion concerning "good will."

^{54e}Knoxville v. Knoxville Water

cerning the income of the company affected for the fiscal year during, or preceding that in which the rate was fixed by the ordinance or statute, but it may receive evidence as to such income in subsequent years.^{54f} In determining whether the rate fixed affords a fair return the amount must be considered as fixed by the ordinance and not as voluntarily reduced by the company, even if such reduction be in accordance with custom and for the purpose of obtaining prompt payment.^{54g} If the State by its legislative enactment has permitted a gas company to capitalize its franchises, their value at the time of capitalization will be included in the value of the property as an element for fixing rates, but no increased value of the franchise can be allowed.^{54h} It is immaterial that the company's franchises are taxed on a greater value than that allowed if it charges its taxes as operating expenses in determining its net income; and if the company has a monopoly in the municipality of furnishing gas, its "good will" cannot be considered. If the property of the company has increased in value since its acquisition, the company is entitled to the benefit of the increase; and therefore the value of its properties at the time of the inquiry is a proper subject for investigation.⁵⁴ⁱ If the statute fixing the rate requires the gas company to perform its service in such a manner that its entire plant will have to be rebuilt at a cost on which no return can be obtained at the rate fixed, then the statute is unconstitutional, because it deprives it of its ability to secure such returns.^{54j} The company

Co., *supra*; Cedar Rapids Gaslight Co. v. Cedar Rapids, 144 Iowa 426; 120 N. W. Rep. 966.

^{54f} Knoxville v. Knoxville Water Co., *supra*.

^{54g} Knoxville v. Knoxville Water Co., *supra*.

^{54h} Wilcox v. Consolidated Gas Co., 212 U. S. 19; 29 Sup. Ct. Rep. 192; 53 L. Ed. 382; 48 L. R. A. (N. S.) 1145; 15 Ann. Cas. 1034. § 453.

⁵⁴ⁱ Wilcox v. Consolidated Gas Co., *supra*. See § 453.

What the plant cost is not determining; for there may "have been extravagant and needless expendi-

ture of money" in its construction; and the money may have been invested in property "unwisely built." Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362; 14 Sup. Ct. Rep. 1047; San Diego L. & T. Co. v. National City, 147 U. S. 739; 19 Sup. Ct. Rep. 804; 43 L. Ed. 1154; Stanislaus County v. San Joaquin C. & I. Co., 192 U. S. 201; 24 Sup. Ct. Rep. 241; San Diego Co. v. Dariego, 118 Cal. 556; 50 Pac. Rep. 633; 62 Am. St. 273.

^{54j} Wilcox v. Consolidated Gas Co., *supra*.

cannot complain of a statute fixing one rate for the municipality and another for individual consumers; or one rate for one class of consumers and another for another class, if the total receipts are sufficient to yield an adequate return.^{54k} The company is entitled to earn enough not only to make current repairs, but also to provide means for repairing parts of the plant when they can no longer be used, so that at the end of any given term the original investment will remain as it was in the beginning.^{54l} But property discarded by the company or forming no part of the plant unless required for immediate expansion cannot be considered in determining rates.^{54m} The cost of the pipes, the prices at which they are ordinarily sold, in connection with the present prices and depreciation by decay may be considered; and so may the original cost of construction, the amount expended in permanent improvements, the amount and market value of the bonds and stocks,⁵⁴ⁿ the present as compared with the original cost of construction,

^{54k}*Wileox v. Consolidated Gas Co., supra.*

One rate for a municipality and another for individual consumers, is not an unreasonable classification, and does not render the statute fixing it unconstitutional under the equal protection clause of the Fourteenth Amendment. *Wileox v. Consolidated Gas Co., supra.*

In the case just cited the Federal Supreme Court held that six per cent. was a fair return on the value of the property employed in supplying gas in the City of New York. The gas company had a monopoly of supplying gas. In this respect the court concurred in the opinion of the lower court (*Consolidated Gas Co. v. City of New York*, 157 Fed. Rep. 849), which in other respects it reversed.

In a case of a natural gas company eight per cent. was considered fair and six per cent. unfair. *Landon v. Public Utilities Commission*, 234 Fed. 152. Eight to ten per

cent. profit was held not unfair in a case of a natural gas company. *Newark v. Newark Natural Gas & Fuel Co.*, 92 Ohio St. 393; 111 N. E. 150. In the case of an artificial plant, six per cent. was considered sufficient. *Des Moines Gas Co. v. Des Moines*, 238 U. S. 153; 35 Sup. Ct. 811; 59 L. Ed. 1124, modifying decree in 199 Fed. 204.

^{54l}*Cedar Rapids Gaslight Co. v. Cedar Rapids*, 144 Iowa 426; 120 N. W. 966.

^{54m}*Cedar Rapids Gaslight Co. v. Cedar Rapids, supra.*

⁵⁴ⁿIf the stock has been watered and passed into the hands of innocent purchasers, but it is worth its par value, can that fact be considered in determining the rate? Dividends on fictitious stock cannot be insisted upon. *Saratoga Springs v. Saratoga Gas, etc., Co.*, 191 N. Y. 123; 83 N. E. Rep. 693, reversing 122 N. Y. App. Div. 203; 107 N. Y. Supp. Rep. 341.

and the probable earning capacity of the property under the particular rates prescribed, and the sum required to meet operating expenses should be considered; but the reasonableness of the rates cannot be determined by the mere addition of the separate value of the component parts of the enterprise, nor from the cost alone, nor from what it might cost to replace the plant. If the gas mains and pipes had been laid in improved streets, then the fact that the streets had since been paved and it would cost more to lay them in the place they occupied at the time of the inquiry into the cost, cannot be considered. Nor can the statute or ordinance be assailed that it allows no discount for prompt payment, and it will entail additional expense for collecting bills; for it cannot be presumed in advance that consumers will not comply with reasonable rules for the security of the company.⁵⁴⁰ In determining whether rates are proper or not confiscatory, courts may examine facts *dehors* the record and annul the action of the legislature on a finding that the rates prescribed impairs the constitutional right of a company's stockholders to receive a just return on the money they have invested; and the legislature may even authorize a commission to receive expert statements and hearsay evidence in fixing rates.⁵⁴¹

⁵⁴⁰ Cedar Rapids Gaslight Co. v. Cedar Rapids, 144 Iowa 426; 120 N. W. Rep. 966; 138 Am. St. 299; affirmed 223 U. S. 655; 32 Sup. Ct. 389; 56 L. Ed. 594. In this case it was also held that the fact the gas company was in possession of land beyond the high water mark of a meandered river must be taken into consideration, since its possession of the land is of value, for only the State can challenge its right.

Courts have no power to establish and fix rates for furnishing gas in the future. That is a legislative function; but whether existing or prescribed rates afford a reasonable compensation is a judicial question which the courts may determine. *Madison v. Madison Gas & El. Co.*, 129 Wis. 249; 108 S. W. Rep. 65.

A contract with a customer for a

certain rate will not enable the company to collect such rate if the rate afterwards be lawfully reduced by ordinance or statute. *Chillicothe v. Logan Nat. Gas, etc., Co.*, 8 Ohio N. P. 88; 11 Ohio S. & C. P. Dec. 24.

⁵⁴¹ *Saratoga Springs v. Saratoga Gas, etc., Co.*, 191 N. Y. 123; 83 N. E. Rep. 693; reversing 122 N. Y. App. Div. 203; 107 N. Y. Supp. Rep. 341; *Richman v. Consolidated Gas Co.*, 186 N. Y. 209; 78 N. E. Rep. 871, affirming 114 N. Y. App. Div. 216; 100 N. Y. Supp. Rep. 81; *Grossman v. Consolidated Gas Co.*, 114 N. Y. App. Div. 242; 100 N. Y. Supp. Rep. 100.

The amount of outstanding bonds and stock are not to be considered where it is shown that such amount is several times the cost of the pres-

§ 451. It must be clearly shown that rate fixed is too low.—
Duty of gas company to make disclosures of its condition.

"The case must be a clear one before the [Federal] courts ought to be asked to interfere with State legislation upon the subject of rates, especially before there has been any actual experience of the practical result of such rates," said Justice Peckham. "The value of real estate and plant is to considerable extent matter of opinion," he continued, "and the same may be said of personal estate when not based upon the actual cost of material and construction. Deterioration of the value of the plant, mains, and pipes is also to some extent based on opinion. All these matters make questions of value somewhat uncertain; while added to this is an alleged prospective loss of income from a reduced rate, a matter also of much uncertainty, depending upon the extent of the reduction and the

ent value of the property; nor the value of the franchise to occupy the streets if nothing was paid for it. Five per cent. income on the value of the plant will not render an ordinance fixing rates confiscatory before an actual trial to determine whether the reduction made in the rate will not result in increased consumption and net earnings. *Lincoln Gas & El. Light Co. v. Lincoln*, 182 Fed. 926.

In New York the public service commissioner is authorized to fix the rates "within the limits prescribed by law," and this is construed that the rates must be reasonable and not in violation of either the common or statute law. *Saratoga Springs v. Saratoga Gas, etc., Co.*, 191 N. Y. 123; 83 N. E. Rep. 693, reversing 122 N. Y. App. Div. 203; 107 N. Y. Supp. Rep. 341.

The stockholders of a gas company cannot require the public to pay dividends on fictitious stock or for their extravagance or waste; but they are entitled to a return only on the actual value of the property devoted to the public use, after paying expenses and liabilities reasonably charged against it. *Saratoga Springs v. Saratoga Gas, etc., Co.*, *supra*.

A city turned over to a gas company its leases, gas wells, and a certain amount in city bonds, gave it the right to its streets upon condition that the company furnish gas for the city and its inhabitants and pay to the city one-fifth of the net profits from the sales for "domestic purposes." It was held that the expenditures of the company for the necessary instrumentalities for producing and distributing gas could not be charged as expenses against its receipts from the sale of gas; that the cost of the operation of the plant, including necessary repairs, should be charged as expenses, to be deducted from the amount received for gas, in order to determine the profits thereon, but such expenses could not include expenditures for new wells, mains, or other permanent improvements, or the cost of supplying gas and making other sales, in the profits of which the city did not share. It was also held that the words "domestic purposes" included gas furnished not only to the homes of the city, but to offices, stores, churches, and the like, where the principal use is for heating and lighting, and not for power. *Erie City v. Erie Gas, etc., Co.*, 78 Kan. 348; 97 Pac. Rep. 468.

probable increased consumption, and we have a problem as to the character of the rate which is difficult to answer without a practical test from actual operation of the rate. Of course, there may be cases where the rate is so low, upon any reasonable basis of valuation, that there can be no just doubt as to its confiscatory nature, and in that event there should be no hesitation in so deciding and in enjoining its enforcement without waiting for the damage which must inevitably accompany the operation of the business under the objectionable rate. But where the rate complained of shows in any event a very narrow line of division between possible confiscation and proper regulation, as based upon the value of the property found by the court below, which differ considerably among the witnesses, and also upon the results in the future of operating under the rate objected to, so that the material fact of value is left much in doubt, a court of equity ought not to interfere by injunction before a fair trial has been made of continuing business under that rate, and thus eliminating, as far as possible, the doubt arising from opinion as opposed to facts."^{54q} In another case Justice Moody used the following language: "The courts, in clear cases, ought not to hesitate to arrest the operation of a confiscatory law, but they ought to refrain from interfering in cases of any other kind. Regulation of public service corporations, which perform their duties under conditions of necessary monopoly will occur with greater and greater frequency as time goes on. It is a delicate and dangerous function, and ought to be exercised with a keen sense of justice on the part of the regulating body, met by a frank disclosure on the part of the company to be regulated. The courts ought not to bear the whole burden of saving property from confiscation, though they will not be found wanting where the proof is clear. The legislature and subordinate bodies, to whom the legislative power has been delegated, ought to do their part. Our social system rests largely upon the sanctity of private property, and that State or community which seeks to invade it will soon discover the error in the disaster which

^{54q} *Wilcox v. Consolidated Gas Co.*, 212 U. S. 19; 29 Sup. Ct. Rep. 192; 53 L. Ed. 382; 48 L. R. A. (N. S.) 1145; 15 Ann. Cas. 1034, reversing 157 Fed. Rep. 849.

"Just and reasonable" rates de-

fined and test and limitations stated. *Public Service Gas Co. v. Board*, 84 N. J. L. 463; 87 Atl. 651, affirmed 87 N. J. L. 581; 92 Atl. 606; 94 Atl. 634; 95 Atl. 1079; *Bonbright v. Geary*, 210 Fed. 44.

follows. The slight gain to the consumer, which he would obtain from a reduction in the rates charged by public service corporations, is nothing compared with his share in the ruin which would be brought about by denying to private property its just reward, thus unsettling values and destroying confidence. On the other hand, the companies to be regulated will find it to their lasting interest to furnish freely the information upon which a just regulation can be based. If hereafter it shall appear, under the actual operation of the ordinance, that the returns allowed by it operate as a confiscation of property, nothing in this judgment will prevent another application to the courts of the United States or to the courts of the State of Tennessee. But as the case now stands there is no such certainty that the rates prescribed will necessarily have the effect of denying to the company such a return as would avoid confiscation.^{54r}

§ 452. In fixing rates each case stands on its own peculiar facts.

In fixing rates for a gas company each case must stand upon its own peculiar facts. What would be sufficient for a gas company in one city would not necessarily be sufficient in another. And a decision in one case "can form no precedent in regard to the valuation of franchises generally, where the facts are not similar to those in the case before us There is no particular rate of compensation which must in all cases and in all parts of the country be regarded as sufficient for capital in business enterprises. Such compensation must depend greatly upon circumstances and locality; among other things, the amount of risk in the business is a most important factor, as well as the locality where the business is conducted

^{54r} Knoxville v. Knoxville Water Co., 212 U. S. 1; 29 Sup. Ct. Rep. 148; 53 L. Ed. 371; Cedar Rapids Gaslight Co. v. Cedar Rapids, 144 Iowa 426; 120 N. W. Rep. 966; Saratoga v. Saratoga Gas, etc., Co., 191 N. Y. 123; 83 N. E. Rep. 693 (rates presumptively valid when fixed by a commission), reversing

122 N. Y. App. Div. 203; 107 N. Y. Supp. Rep. 341.

Gas rates under which the *total income* earned is sufficient to pay return on its investment are not confiscatory because the furnishing of gas to some small consumers under the rate would be at a loss. Lincoln Gas & El. L. Co. v. Lincoln, 182 Fed. 926.

and the rate expected and usually realized there upon investments of a somewhat similar nature with regard to the risk attending them. There may be other matters which in some cases might also be properly taken into account in determining the rate which our investor might properly expect or hope to receive and which he would be entitled to without legislative interference. The less risk, the less right to any unusual returns from the investments. One who invests his money in a business of a somewhat hazardous character is very properly held to have the right to a larger return without legislative interference, than can be obtained from an investment in Government bonds or other perfectly safe security. The man that invested in gas stock in 1823 had a right to look for and obtain, if possible, a much greater rate upon his investment than he who invests in such property in the city of New York years after the risk and danger involved had been almost eliminated.”^{54s}

§ 453. Value of good will, when not to be considered in fixing rates.—Risks of promotion.—Cost of promotion.

If a gas company has a monopoly of furnishing gas in a municipality, then the value of its good will cannot be considered in fixing rates. “In an investment in a gas company,” said Justice Peckham, “such as complainant’s, the risk is reduced almost to a minimum. It is a corporation, which in fact, as the court below remarks,^{54t} monopolizes the gas service of the largest city in America, and is secure against competition under the circumstances in which it is placed, because it is a proposition almost unthinkable that the city of New York would, for purposes of making competition, permit the streets of the city to be again torn up in order to allow the mains of another company to be laid all through them to supply gas which the present company can adequately supply.”^{54u} And,

^{54s} *Wilcox v. Consolidated Gas Co.*, 212 U. S. 19 ; 29 Sup. Ct. Rep. 192; 53 L. Ed. 382; 48 L. R. A. (N. S.) 1145; 15 Ann. Cas. 1034, reversing 157 Fed. Rep. 849.

^{54t} *Consolidated Gas Co. v. New York City*, 157 Fed. Rep. 849.

^{54u} Yet this has been done in some cities, in order to bring in competition where there was only one company who were charging unreasonable prices for gas.

so far as it is given us to look into the future, it seems as certain as any thing of such a nature can be, that the demand for gas will increase, and, at the reduced price, increase to a considerable extent. An interest in such a business is as near a safe and secure investment as can be imagined with regard to any private manufacturing business, although it is recognized at the same time, that there is a possible element of risk, even in such a business. The court below regarded it as the most favorably situated gas business in America, and added that all gas business is inherently subject to many of the vicissitudes of manufacturing. Under the circumstances, the court held that a rate which would permit a return of six per cent. would be enough to avoid the charge of confiscation, and for the reason that a return of such an amount was the return ordinarily sought and obtained on investments of that degree of safety in the city of New York. Taking all the facts into consideration, we concur with the court below on this question, and think complainant is entitled to six per cent. on the fair value of its property devoted to the public use.” “We are also of the opinion that it is not a case for a valuation of ‘good will.’ . . . The complainant has a monopoly in fact, and a consumer must take gas from it or go without. He will resort to the ‘old stand,’ because he can not get gas anywhere else. The court below excluded that item, and we concur in that action.”^{54v} But even under an exclusive franchise, a gas company is entitled to compensation for the risks incurred in engaging in the business, it has been held; and that it should not be excluded from the advantage of prudence and foresight in its development, but it should not be relieved of the consequences of mistakes and errors of judgment, nor can anything be allowed for its promotion and organization, because it is immaterial by whom the plant may be owned in estimating its value.^{54w}

^{54v} *Wilcox v. Consolidated Gas Co.*, 212 U. S. 19; 29 Sup. Ct. Rep. 192; 53 L. Ed. 382; 48 L. R. A. (N. S.) 1134; 15 Ann. Cas. 1034, reversing 157 Fed. Rep. 849.

^{54w} *Cedar Rapids Gaslight Co. v. Cedar Rapids*, 144 Iowa 426; 120 N. W. 966.

If the company paid nothing for the franchise or right to occupy the streets, then the value of such franchise cannot be considered in determining the unreasonableness of the rate. *Lincoln Gas & El. Co. v. Lincoln*, 182 Fed. 926.

§ 454. Difficulty of determining values and fixing rates.—
Practical test.

Speaking of the difficulty of determining the values of the properties of gas plants and in fixing the rates to be allowed, or rather what is and what is not a confiscatory rate, Justice Peckham has said: "Where a large amount of the total value of a mass of different properties consists in the value of real estate, which is only ascertained by the varying opinions of expert witnesses, and where the opinions of the plaintiff's witnesses differ quite radically from those of the defendant's, it is apparent that the total value must necessarily be more or less in doubt. It, in other words, becomes mere matter of speculation or conjecture to a great extent. It may be, as already suggested, that in many cases the rates objected to might be so low that there could be no reasonable doubt of their inadequacy upon any fair estimate of the value of the property. In such event the enforcement of the rates should be enjoined, even a case where the value of the property depends upon the value to be assigned to real estate by the evidence of experts. But there may be other cases where the evidence as to the probable result of the rates in controversy would show they were so nearly adequate that nothing but a practical test could satisfy the doubt as to their sufficiency. In this case a slight reduction in the estimated value of the real estate, plants and mains, as given by the witnesses for complainant, would give a six per cent. return upon the total value of the property. And again, increased consumption at the lower rate might result in increased earnings, as the cost of furnishing the gas would not increase in proportion to the increased amount of gas furnished. The elevated roads of New York when first built charged ten cents for each passenger, but when the rates were reduced to five cents it is common knowledge that their receipts were not cut in two, but that from increased patronage the earnings increased from year to year, and soon surpassed the highest sum ever received upon the ten cent rate. Of course, there is always a point below which a rate could not be reduced and at the same time permit the proper return on the value of the property, but it is equally true that a reduction in rates will not always reduce the net earnings, but, on the contrary, may increase them.

The question how much an increased consumption under a less rate will increase the earnings of complainant, if at all, at a cost not proportioned to the former cost, can be answered only by a practical test. In such a case as this, where the other data upon which the computation of the rate must be based, are from evidence so uncertain, and where the margin between possible confiscation and valid regulation is so narrow we cannot say there is no fair or just doubt about the truth of the allegation that the rates are insufficient." "It may possibly be, however, that a practical experience of the effect of the acts by actual operation under them might prevent the complainant from obtaining a fair return, and in that event complainant ought to have the opportunity of again presenting its case to the court. To that end we reverse the decree, with directions to dismiss the bill without prejudice."^{54x}

§ 455. Rates for municipality.—Mandamus.

Where it is necessary for a municipality to have gas to light its streets and public buildings; and such municipality has no contract with a gas company occupying its streets with pipes and mains, and having a virtual monopoly, it is entitled to gas at reasonable rates or prices; and if the company insist upon an unreasonable price for gas, upon the demand of the city, such city may offer a reasonable price for it; and if the company refuses to furnish gas at that price, the city may obtain a mandamus, if the supply has not been commenced, or may sue in equity to enjoin the stoppage of a supply being furnished.^{54y} But where a statute provides a method for the

^{54x} *Wileox v. Consolidated Gas Co.*, 212 U. S. 19; 29 Sup. Ct. Rep. 192; 53 L. Ed. 382; 48 L. R. A. (N. S.) 1134; 15 Ann. Cas. 1034, reversing 157 Fed. 849; *Cedar Rapids Gaslight Co. v. Cedar Rapids*, 238 U. S. 153; 35 Sup. Ct. 811; 59 L. Ed. 1244, affirming 144 Iowa 426; 120 N. W. Rep. 966; 48 L. R. A. (N. S.) 1025; 138 Am. St. 299; *Saratoga Springs v. Saratoga Gas, etc., Co.*, 191 N. Y. 123; 83 N. E. Rep.

693; 122 N. Y. App. Div. 203; 107 N. Y. Supp. Rep. 341.

The court or utilities commission may fix the rate temporarily and order a test to be made in order to determine what is a fair rate. *State v. Public Service Commission*, 269 Mo. 525; 191 S. W. 412; *Des Moines Gas Co. v. Des Moines*, 199 Fed. 204.

^{54y} *Public Service Corp. v. American Lighting Co.*, 67 N. J. Ch. 122;

establishment of rates, as through the agency of a commission given power so to do, a city cannot decline to pay its bills on the ground that the rate charged by the gas company is excessive, and then obtain a preliminary injunction to restrain the company from turning off the gas, unless it pays the admittedly just rates for the gas received.^{54z}

§ 456. Rates for consolidating companies.

Difficulties sometimes arise in fixing rates for gas where two or more companies consolidate, and as to one of them there is no reservation to fix its rates or where a statute allowing the rates to be charged is enacted after a company received its franchise while as to the other companies their franchise was granted after its enactment, and, of course, subject to its provisions authorizing a change in their rates. In such cases the immunity from regulation of one of the companies cannot as a rule be extended to the other companies. Thus any contract exempting a gas company from State regulation of the price of gas does not extend to the plants of, and territory occupied by, certain other gas companies, not possessing such immunity in their own right, when absorbed by the former company under statutes allowing their consolidation and merger, but providing that the consolidated company should be subject to the legal obligations arising on each of the constituent companies.^{54aa}

57 Atl. Rep. 482. It was also held in this case that the company could not be compelled to furnish the city with gas without its being measured.

^{54z} Buffalo v. Buffalo Gas Co. (N. Y.), 112 N. Y. Supp. Rep. 468.

^{54aa} People's Gaslight & Coke Co. v. Chicago, 194 U. S. 1; 24 Sup. Ct. Rep. 520; 48 L. Ed. 851, affirming 114 Fed. Rep. 384. Citing St. Louis & S. F. R. Co. v. Gill, 156 U. S. 656; 15 S. Ct. 484; 39 L. Ed. 569; Nor-

folk & W. R. Co. v. Pendleton, 156 U. S. 667; 15 S. Ct. 413; 39 L. Ed. 574; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 586; 17 S. Ct. 198; 41 L. Ed. 562; Minneapolis & St. L. R. Co. v. Gardner, 177 U. S. 332; 20 S. Ct. 656; 41 L. Ed. 793; Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174; 9 S. Ct. 47; 32 L. Ed. 377. See also Rogers Park Water Co. v. Fergus, 178 Ill. 571; 53 N. E. Rep. 363.

§ 457. Unlawful combination defeating right to have reasonable rates.

An agreement between rival companies fixing the price for gas which is a violation of a statute does not, after they have ceased to act under it, defeat their right to apply for an injunction to restrain the enforcement of an unjust rate for gas fixed by the State or a municipality.^{54bb}

§ 458. Legislature fixing maximum rate.

It is the usual practice in fixing rates for the legislature to declare that a gas company shall not charge a rate exceeding a certain amount. When that is the case that statute practically grants express authority to charge up to that rate.^{54cc}

§ 459. Statute requiring excessive pressure in pipes.

By act of the legislature the Consolidated Gas Company of New York City was required to maintain a certain pressure in its pipes, and the price of gas was also regulated. In a contest over the validity of this statute, it was shown beyond question that to maintain such pressure there would be a great possible if not probable danger of explosion in the mains and other pipes. To eliminate this danger would require strengthening all the mains and other pipes, and that would involve an expenditure of many millions of dollars upon which no return

^{54bb} Peoria Gas & El. Co. v. Peoria, 200 U. S. 48; 26 Sup. Ct. Rep. 214; 50 L. Ed. 365.

^{54cc} Brooklyn Gas Co. v. New York City, 50 N. Y. Misc. Rep. 450; 100 N. Y. Supp. Rep. 570; Brooklyn Gas Co. v. New York City, 115 N. Y. App. Div. 69; 100 N. Y. Supp. Ct. Rep. 625, affirmed 188 N. Y. 334; 81 N. E. Rep. 141; Saratoga Springs

v. Saratoga Gas, etc., Co., 191 N. Y. 123; 83 N. E. Rep. 693, reversing 122 N. Y. App. Div. 203; 107 N. Y. Supp. Rep. 341.

A statute requiring a gas company to furnish gas through standard meters at a meter rate is a valid exercise of the police power. Pawhuska Oil & Gas Co. v. Pawhuska, 47 Okl. 342; 148 Pac. 118.

could be obtained at the rates prescribed by the statute. "This would take from the complainant," said the court, "the ability to secure the return to which it is entitled upon its property, used for supplying gas, and the provision as to the amount is therefore void." This court considered this provision, however, separable from the other provisions of the statute, and it therefore was not fatal to them. The statute required the company to furnish a light of twenty-two candle-power, and it was held that the obligation would remain upon the company to have a pressure sufficient to insure such a light, notwithstanding the unconstitutional provision as to the degree of pressure attempted to be rendered obligatory.^{54dd}

§ 460. Consumers cannot complain of rates fixed by legislature.

Citizens of a city or customers of a gas company cannot complain of the rates if they are fixed by the legislature, however extortionate they may be; for they are not compelled to accept the service of the company, nor pay the rate fixed unless they take the gas.^{54ee} Nor can the courts declare such rates are unreasonably high.^{54ff}

§ 461. Continuing supply gas pending litigation.

Where a public service commission was empowered to fix the rate for gas, and a gas company contested the validity of the statute creating the commission and endowing it with power over rates, it was held that the company's consumers were

^{54dd} *Wilcox v. Consolidated Gas Co.*, 212 U. S. 19; 29 Sup. Ct. Rep. 192; 53 L. Ed. 382; 48 L. R. A. (N. S.) 1134; 15 Ann. Cas. 1034.

^{54ee} *Brooklyn Union Gas Co. v. New York City*, 50 N. Y. Misc. Rep. 450; 100 N. Y. Supp. Rep. 570.

^{54ff} *Ibid.*; *Brooklyn Gas Co. v. New York City*, 188 N. Y. 334; 81 N. E. Rep. 141, affirming 115 N. Y. App. Div. 69; 100 N. Y. Supp. Rep. 625.

entitled to a continuance of the service on payment of the rates so prescribed until the determination of the constitutional question, the constitutionality of the statute being presumed until a judicial determination that it was not.^{54gg}

§ 462. Parties to suit to enjoin enforcement of ordinance or statute.

Usually when a gas company brings a suit to restrain the enforcement of an ordinance fixing the rate for gas furnished inhabitants of the municipality, it is only necessary to make the city a party defendant. If the rates are fixed by statute, then the officers whose duty it is made to enforce its provisions may usually be restrained. Although it is a general rule that the enforcement of a criminal statute cannot be restrained, yet where its enforcement is so disastrous as to seriously damage a public service corporation in its right to serve the public and collect a remuneration therefor, a court of equity will inquire into its validity, and if found to be invalid it will restrain the officers enforcing it. And where by statute any consumer could not maintain a suit to restrain the enforcement of illegal rates by a gas company and to compel the company to furnish gas at the rate prescribed by an ordinance, or recover a penalty for its refusal, it was held that in a suit by the gas company against a city and its officers to enjoin the enforcement of an ordinance fixing rates, on the ground that it was unconstitutional, and the total number of consumers in the city was

^{54gg} Richman v. Consolidated Gas Co., 186 N. Y. 209; 78 N. E. Rep. 871, affirming 114 N. Y. App. Div. 216; 100 N. Y. Supp. Rep. 81; Grossman v. Consolidated Gas Co., 114 N. Y. App. Div. 242; 100 N. Y. Supp. Rep. 100, affirmed 186 N. Y. 541; 78 N. E. Rep. 871.

public utilities commission. State v. Landon, 100 Kan. 593; 165 Pac. 1111.

Simply because it has filed a petition with the Public Utilities Commission, for a change of rates, the gas company cannot make a change before permitted by the Commission. Wodenhut v. Empire Gas & El. Co., 166 N. Y. Supp. 29.

A receiver of a gas company cannot change the rate where power to change the rate is lodged with a

so large as to prevent their being made parties, that a temporary restraining order granted pending hearing properly include all consumers, although not parties to the record, they being the real parties in interest and represented by the municipality.^{54hh}

§ 463. Refunding illegal amounts collected during pending litigation.

Where a temporary restraining order is sought to restrain the enforcement of an ordinance or statute on the ground that the rate is unconstitutional, the court may require, as a condition to the issuance of such an order, the complainant to give a bond for the refunding of all monies collected during the litigation in excess of the rate so fixed, if the ordinance or statute be found to be unconstitutional; or it may require it to pay into court such excess, to be disposed of by the court on the final determination of the case.⁵⁴ⁱⁱ In one instance a gas company was ordered to refund the excess rate it had received; and it paid it into court for distribution. The whereabouts of some of the customers of the company could not be found, and their shares were returned to the company upon it giving bond to make payments to those entitled thereto on their subsequent appearance, the suit being kept alive in the meantime to enforce necessary orders.^{54jj}

^{54hh} *San Francisco Gas & El. Co. v. San Francisco*, 164 Fed. Rep. 884.

⁵⁴ⁱⁱ *San Francisco Gas & El. Co. v. San Francisco*, 164 Fed. Rep. 884; *Central Trust Co. v. New Amsterdam Gas Co.*, 167 Fed. Rep. 983. In this last case there were 873,000 customers, and the litigation ran for two and a half years. The excess rates paid to the master in chancery realized some interest. It was held that this interest would be used in the first instance to pay the expense

of administering the fund—to pay for the cost of distributing the excess rate among such customers; and no distribution of such interest would be made until the amount of the excess, after deducting such cost of administration, had been ascertained.

^{54jj} *Northern Union Gas Co. v. Mayer*, 171 Fed. Rep. 602.

As to illegal charges for meters, see *Fleming v. Taylor, etc., Co.*, 90 Kan. 763; 136 Pac. 228.

§ 464. Power to authorize common council or a commission to fix rates.

There is no doubt that the legislature may empower the common council of a city, when it can do so itself, to fix the price of gas, always bearing in mind that it must be a just rate and not a confiscatory one. The legislature may thus delegate its power. And the legislature may create and endow a commission with power to fix rates, authorizing it to hear evidence and require the particular gas company under investigation to furnish such evidence as it has concerning the value of its plant, the cost of production, and the amount and value of its stock. It may even empower it to fix rates for gas and enable it to fix them at a just rate to receive *ex parte* and hearsay evidence, and base its decision thereon, at least if an appeal is allowed from the decision made.^{54kk} This is particularly true where no uniform rate of charges can be established throughout the state that would be just or reasonable, and that an approximation of a reasonable tariff would require special rates to be prescribed for many different localities. And though no adequate remedy can be had by appeal, that will not render the statute invalid, if the concurrent remedy of injunction to restrain the enforcement of any improper rate be preserved. It will be presumed by the court that the rate fixed, even by a public commission, is valid until the contrary be shown, even upon appeal from its order.^{54ll} When a statute contemplates notice to the gas company of an intention to investigate and possibly fix or change the rate, the commission cannot act on the *ex parte* statements of its officers, agents and inspectors, without affording the corporation an opportunity to have a

^{54kk} *Saratoga Springs v. Saratoga Gas, etc., Co.*, 191 N. Y. 123; 83 N. E. Rep. 693, reversing 122 N. Y. App. Div. 203; 107 N. Y. Supp. Rep. 341. In this case a constitutional provision on the division of governmental power provided that the "whole" power of one of the three departments of government should not be exercised by the same

hands which possessed the "whole" power of either of the other departments. It was considered that this provision did not prevent the imposition on an administrative body of some powers legislative in character.

^{54ll} *Saratoga Springs v. Saratoga Gas, etc., Co.*, *supra*.

knowledge of and controvert such statements.^{54mm} Conferring power upon the courts to review the action of the commission and fix the rate does not confer upon them non-judicial functions.⁵⁴ⁿⁿ

^{54mm} *Saratoga Springs v. Saratoga Gas, etc., Co., supra.*

⁵⁴ⁿⁿ *Saratoga Springs v. Saratoga Gas, etc., Co., supra.*

Where a statute provided that the rate fixed should be the maximum price to be charged by the company for a term of three years, and that until after the expiration of that term the commissioner should, on complaint filed by certain city officers or customers, again fix the price for gas, it was held that, though the time within which the price fixed was to be operative was within the power of the legislature, yet the statute was invalid, because it deprived the company furnishing the gas of the equal protection of the laws, in that no provision was made whereby the company could secure a modification of the order after the three-year term, though the conditions had so changed in the meantime that the rates fixed were confiscatory; and this objection to the statute was not obviated by the fact that, if the rates fixed became unfair, the gas company could apply to the legislature for relief and for a repeal of the statute, or might contest the validity of the rates fixed in the courts. *Saratoga Springs v. Saratoga Gas, etc., Co.*, 191 N. Y. 123; 83 N. E. Rep. 693, reversing 122 N. Y. App. Div. 203; 107 N. Y. Supp. Rep. 341.

In New York the Public Service Commission may authorize an issue of bonds for purposes clearly legal,

and refuse to authorize an issue to take up original bonds whose validity is questioned. *People v. Public Service Commission*, 137 N. Y. App. Div. 810; 122 N. Y. Supp. Rep. 641.

A Federal Court has jurisdiction to enjoin an ordinance that is confiscatory. *San Francisco Gas & El. Co. v. San Francisco*, 189 Fed. 943.

This statute prohibits the issuance of stock or bonds except for money, and for labor done on property actually received for the lawful use of the company; that the company may increase or reduce its capital stock in the manner therein provided, but not beyond any maximum prescribed by the general law governing corporations formed for sinister purposes; that no company subject to the powers of the company could issue stock or bonds until the commission shall certify in writing that the amount was reasonably required for corporate purposes, and the commission could take and hear testimony, examine books, etc., in arriving at the conclusion. It was held that the duties of the commission were administrative, and, where its consent was asked for the issuance of stock and bonds, it was required to determine whether such stock and bonds were to be issued for property, labor, etc., and for the reasonable requirements of the company. *In re Watertown Gaslight Co.*, 127 N. Y. App. Div. 462; 111 N. Y. Supp. Rep. 486.

§ 465. **Public Utilities Commission.—Powers.—Practice.—Appeal.—Mandamus.—Certiorari.**

Public Utilities Commissions are wholly by statutory construction; and their powers are conferred solely by statutes. The practice before them greatly varies, and it would serve no good purpose to enter into a minute discussion here concerning their powers or the practice before them. If a statute does not confer power upon them to do a particular act, then any attempt on their part to do it is a nullity. Such was the case where a utilities commission endeavored to prescribe rates for a gas company operating in a city under a city franchise,^a or where it required a gas company to extend its lines to new gas fields so as to constantly furnish an adequate supply of natural gas.^b In New York the Public Service Commission Law required gas companies before exercising any franchise, the exercise of which had been suspended, to obtain the permission of the commission; and it was held that it did not apply to a gas company which had ceased using its pipes, where the franchise to use the streets did not require it to furnish gas.^c The rule is generally that he who challenges a rate once fixed by competent authority has the burden to show that it is either too high or too low, whichever of the two he claims; and that is true where the gas company has fixed a rate and it is challenged as too high. But this is sometimes changed by statute. Thus in Washington it was held that the burden of proof as to the reasonableness of a proposed increase of rate, on an inquiry before the Public Service

^a Shawnee Gas & Electric Co. v. Corporation Commission, 35 Okl. 454; 130 Pac. 127.

^b Fidelity Life & T. Co. v. Natural Gas Co., 219 Fed. 614.

^c Freedonia v. Freedonia Natural Gas Co., 84 Misc. Rep. 150; 145 N. Y. Supp. 820 (but the order was reversed, 162 App. Div. 924; 145 N. Y. Supp. 1116).

Commission, at the instance of another, was not on the gas company, the proposed rate not being judicially unreasonable and not having been previously fixed by the commission.^d Where the application is to change the rate, it is discretionary with the commission whether it will go beyond the evidence adduced by the applicant or others interested in the matter of the charge.^e In New Jersey where no provision for an appeal had been made, it was held that the only effective remedy for a city claiming that a gas rate fixed by the board of public utility was too high was by writ of mandamus commanding the commission to reduce the rate,^f and not by a writ of certiorari, since the only effect of the judgment of certiorari was to set aside an existing order, in which case the old rate would remain until altered.^g Where both the gas company and a city by separate writs of certiorari challenged the order fixing a rate, it was held that the city was entitled to a determination on the merits of its claim, that the rate was too high, despite the judgment on the gas company's certiorari.^h In other States appeals are allowed from the finding of a commission.ⁱ

^d *State v. Public Service Commission*, 76 Wash. 492; 136 Pac. 850.

^e *State v. Public Service Commission*, 76 Wash. 492; 136 Pac. 850.

^f *Public Service Gas Co. v. Board*, 87 N. J. L. 581; 92 Atl. 606; 94 Atl. 634; 95 Atl. 1079, affirming 84 N. J. L. 463; 87 Atl. 651.

^g *Public Service Gas Co. v. Board*, 84 N. J. L. 403; 87 Atl. 651, affirmed 87 N. J. L. 581; 92 Atl. 606; 94 Atl. 634; 95 Atl. 1079.

^h *Passaic v. Board*, 87 N. J. L. 705; 95 Atl. 127, reversing 87 N. J. L. 581; 92 Atl. 606.

ⁱ *Harris-Irby Cotton Co. v. State*, 31 Okl. 367; 121 Pac. 642.

Where a State constitution requires a notice of adverse proceedings to be given, a statute creating a Public Service Commission and making no provision for a notice, a hearing before a commission on an application to change or fix rates is not, because of the omission, unconstitutional. *Manufacturers' Light & Heat Co.*, 215 Fed. 940.

A Public Utilities Commission may be empowered to require public utilities to keep books and accounts according to a uniform system. *People v. Strauss*, 166 N. Y. Supp. 196.

§ 466. Gas companies quasi public corporations—rates may be changed.

There is a general tendency in the courts to get away from the earlier decisions; and while not *in enomine* overturning these decisions, yet to give grants to gas and water companies a strict construction, and to hold that a State or city may revise the company's rates unless the express words of the grant prohibit it. The line of reasoning is that such companies are quasi-corporations, charged with a public duty to supply an article necessary to municipal life—a duty that the municipality itself may perform and which it has delegated to another to perform for it—that it enjoys a privilege necessarily often of a monopolistic character, a privilege granted it by the public, and from which it derives a financial benefit; and that by the acceptance of such a grant or privilege it devotes its property in a measure to public use, and is therefore more subject to State or municipal control or regulation than if it were purely a private corporation.⁵⁵ These decisions find an illustration in an Illinois case arising out of the annexation of the village of Rogers Park by the city of Chicago. In 1888 Rogers Park granted to a water company the right to lay water pipes in its street in order to supply it and its inhabitants with water during the period of thirty years at a rate fixed by the ordinance. In 1893 the village was annexed to the city of Chicago, and four years afterwards the Chicago common council provided by ordinance that the rates in the annexed territory should be

⁵⁵ State v. Cincinnati Gaslight and Coke Co., 18 Ohio St. 262; Logan Natural Gas and Fuel Co. v. Chillicothe, 65 Ohio St. 186; 62 N. E. Rep. 122; People v. Chicago Gas Trust Co., 130 Ill. 268; 22 N. E. Rep. 798; 8 L. R. A. 497; 29 Amer. and Eng. Corp. Cas. 257; Toledo v. N. W. Ohio, etc., Co., 8 Ohio S. and C. P. Dec. 277; 6 Ohio N. P. 531; 5 Ohio Cir. Ct. Rep. 557; Cincinnati Gaslight and Coke Co. v. Avondale, 43 Ohio St. 257; 1 N. E. Rep. 527;

Pocatello Water Co. v. Standley (Idaho), 61 Pac. Rep. 518; Fellows v. Walker, 39 Fed. Rep. 651; Cincinnati, etc., Ry. Co. v. Bowling Green, 57 Ohio St. 336; 49 N. E. Rep. 121; People's Gaslight and Coke Co. v. Hale, 94 Ill. App. 406; Waddington v. Allegheney Heating Co., 6 Pa. Ct. Rep. 96; Tacoma Gas, etc., Co. v. Tacoma, 14 Wash. 288; 44 Pac. Rep. 655; Tampa v. Tampa W. W. Co. (Fla.), 34 So. Rep. 631.

the same as they were in that portion of Chicago not embraced in the annexed territory, which were considerably below the rates that had existed in the new territory before its annexation. The water company contended that it was not bound by the new ordinance, for the reason that it violated the State constitution in that clause which forbade the enactment of a law impairing the obligation of a contract; and that until the thirty years had expired it was entitled to supply the territory formerly embraced in Rogers Park at the rates established in the first ordinance. But the Supreme Court of that State held that its contention could not be sustained. "The village exercised the power," said the court, "by incorporating in the ordinance a scale of prices as being just and reasonable maximum rates to be paid to the company by the consumers. This provision of the ordinance had not the effect to establish a contract between the company and the village that the individual inhabitants of the village should and would pay such rates for the period of thirty years, or any fixed period of time, but was simply a declaration on the part of the village that such rates were reasonable. The legal effect was to establish, *prima facie*, that the corporation, in order to discharge the duty it owed to the public, must supply the commodity it had been created to supply at the prices named in the ordinance. It was a mode of regulating and enforcing the discharge of a legal duty, not a proposition looking towards a contract. No contract was necessary to create an obligation on the part of the corporation to supply water at a reasonable rate, for that rested upon it as a duty. Nor did the fixing of rates by the alleged ordinance of the village of Rogers Park vest in the company an irrevocable right to exact such rates for the period it had been granted permission to occupy the streets, alleys, and public places of the village, or for any fixed period. A rate or price reasonable and just when fixed may, in the future, become so unreasonably high that the exaction of such rate or price is but an extortion. The duty of the corporation does not, however, change, but remains the same; that is, to exact only reasonable compensation. The power of the State to enforce that duty is not ex-

hausted by its exercise in the first or any subsequent instance, but is continuous, and may be asserted from time to time, whenever necessary to prevent extortion by the agency created by the State to serve the public. Whenever the evil of extortion exists, the power to eradicate it may be successfully invoked. In the exercise of that power by the State, or by a municipality exercising the power by delegation from the State, there is no admixture whatever of any contractual element; nor does the corporation against whom the power is exercised obtain any vested property or property right in the sale of rates deemed at any particular time to be reasonable maximum prices for the article to be supplied by the corporation. The annexation of the village of Rogers Park to the city of Chicago operated to clothe the city council of the city with ample authority to determine, *prima facie*, whether the rates demanded by the company for water applied to the inhabitants of that part of the city which was formerly within the limits of the village were reasonable, and to enact an ordinance reducing such rates if deemed by it to be extortionate.”⁵⁶

§ 467. Same continued.— Rates may be changed.

The question receives further exposition in another and earlier Illinois case. A water company was organized in November, 1882, to supply the city of Danville with water, pursuant to an Act of the legislature providing that “the General Assembly shall at all times have power to prescribe such regulations and provisions as it may deem advisable, which regulations and provisions shall be binding on any and all corporations formed under the provisions of” the Act.⁵⁷ By the provisions of an ordinance of the city of Danville under which the company received its right to occupy the streets of that city and

⁵⁶ *Rogers Park Water Co. v. Ferguson*, 178 Ill. 571; 53 N. E. Rep. 363; *People's Gaslight and Coke Co. v. Hale*, 94 Ill. App. 406.

It is also held in this case that the signing of an application by the consumer for water, subject to the regulations thereafter to be adopted, was not such a contract as bound

him to continue to pay the rates of the company permitted by the ordinance when the application was made before the reduction was attempted. See, however, *Foster v. Findlay*, 5 Ohio Cir. Ct. 455; 3 Ohio Cir. Dec. 224.

⁵⁷ 1 Starr and Curt. Ann. Stat. (2d ed.), p. 1006, Sec. 9.

supply its inhabitants with water the rates for city hydrants were fixed for the term of thirty years; and the company furnished to the city water at those rates for years until 1895, when the common council adopted a new ordinance, lowering the rates for hydrants from \$62.50 per annum for the first 100, and all others \$50, to \$50 per annum for the first 140, and \$40 for all others; which ordinance the company refused to accept. The city was authorized by statute to enter into a contract, at the time it did so, "for a supply of water for public use, for a period not exceeding thirty years."⁵⁸ This Act was silent as to the rates to be charged and as to the mode of fixing them; but a statute one day later in date empowered a city "to authorize any person or private corporation to construct and maintain water works" at such rates as might be fixed by ordinance for a period not exceeding thirty years.⁵⁹ In 1891 an Act of the legislature was passed authorizing a city in which was a corporation supplying it and its inhabitants with water "to prescribe by ordinance maximum rates and charges for the supply of water furnished by such . . . corporation to such city . . . and the inhabitants thereof, such rates and charges to be just and reasonable"; and if the rates were unjust and unreasonable, the Circuit Court was empowered to review and determine them. The company refused to accept the provisions of the ordinance of 1895, claiming that it was a violation of its contract with the city; and brought suit to recover a year's rental under the old ordinance. The court held the new ordinance was valid; and that the company could only recover according to the rates fixed by it. The court said that the "authority to contract for a supply of water for public use for a period not exceeding thirty years" did "not necessarily provide that the price of the supply should be fixed for the entire period. The supply could be made for the entire term, but the price is to be determined from time to time, and the rates to be settled by the rules of the common law."⁶⁰ The

⁵⁸ 1 Starr and Curt. Ann. Stat. p. 545.

⁶⁰ Citing *Carlyle v. Carlyle, etc.*, Co., 52 Ill. App. 577.

⁵⁹ 1 Starr and Curt. Ann. Stat. p. 508.

court admitted that the statute under which the company was formed was silent on the question of rates, but said: "Where the charter of a gas or water company in a city does not expressly confer on the company the right to fix its own prices, such silence cannot be construed into a grant of the franchise to fix its own rates. So, here, the silence of the Act as to the rates to be charged does not necessarily confer upon the municipality the power to fix one established rate for the whole period during which the contract is to run. If, however, it be doubtful whether the language of the Act does or does not confer the power upon cities to contract for a supply of water at a fixed rate for the whole period of thirty years, such doubt must be resolved in favor of the public." The court then proceeds to say: "The clause 'for a period not exceeding thirty years' qualifies the words 'construct and maintain the same,' but does not qualify the words 'at such rates as may be fixed by ordinance.' In other words, the council may authorize a private corporation to construct and maintain water works for a period not exceeding thirty years, and they may authorize a private corporation to construct and maintain the water works at such rates as may from time to time be fixed by ordinance."⁶¹ Another case of the same character was that of the city of Freeport, in which a like decision was made.⁶² Appeals from these decisions were taken to the Supreme Court of the United States, and the cases affirmed; but the decisions were put upon grounds slightly different from that of the Illinois court, as will appear in the following extract from the opinion in the Freeport case: "Our conclusion is that the powers conferred by the statutes of 1872 can, without straining, be construed as distributive. The city council was authorized to contract with any person or

⁶¹ *Danville v. Danville Water Co.*, 178 Ill. 299; 53 N. E. Rep. 118; 180 Ill. 235; 54 N. E. Rep. 224. In another case between the same parties (186 Ill. 326; 57 N. E. Rep. 1129), the court renders a short opinion, referring to the opinion from which the above quotation is made; and this case in which the

short opinion is rendered is affirmed on appeal to the Supreme 862. See also *Tampa v. Tampa W. W. Co. (Fla.)*, 34 So. Rep. 631.

⁶² *Freeport Water Co. v. Freeport*, 186 Ill. 179; 57 N. E. Rep. 862. See also *Tampa v. Tampa W. W. Co. (Fla.)*, 34 So. Rep. 631.

corporation to construct and maintain water works *at such rates as may be fixed by ordinance, and for a period not exceeding thirty years*. The words '*fixed by ordinance*,' may be construed to mean by ordinance once for all to endure during the whole period of thirty years; or by ordinance from time to time as might be deemed necessary. Of the two constructions that must be adopted, which is most favorable to the public, not that one which would so tie the hands of the council that the rates could not be adjusted as both parties might require at a particular time."⁶³ Where a gas company, organized before any statute or constitutional provision, authorized a regulation of it by the State or a municipality, was authorized to charge not to exceed three dollars per thousand feet, after such a statute was enacted, consolidated, pursuant to a statute authorizing it to do so, subject to the conditions resting upon each of them, none of them being in fact extinguished, it was held that it subjected itself to regulations, with respect to its rates, by the municipality, and could only charge the rates allowed by the companies it had absorbed.⁶⁴

§ 468. Same continued — rates may be changed.

The Supreme Court of Ohio holds that gas companies, because of their peculiar relation to the public, are such corporations as their rates to private consumers may be changed by the legislature or by a municipality in pursuance of a statute authorizing it to make a change. In 1849 the legislature chartered the

⁶³ Freeport Water Co. v. Freeport City, 180 U. S. 587; 21 S. Ct. 493; affirming 186 Ill. 179; 57 N. E. Rep. 862; Danville Water Co. v. Danville, 180 U. S. 619; 21 St. Ct. 505; affirming 186 Ill. 326; 57 N. E. Rep. 1129; Rogers Park Water Co. v. Fergus, 180 U. S. 624.

⁶⁴ People's Gaslight and Coke Co. v. Chicago, 114 Fed. Rep. 384, affirmed 194 U. S. 1; 24 Sup. Ct. Rep. 520; 48 L. Ed. 851.

The constitution of the State of Washington authorizes a municipality of a specified population to form

a charter for its own government "consistent with and subject to" its provisions and the laws of the State. A general law authorized a municipality of the population specified to regulate and control the "use" of gas, but contained no provision as to the price. It was held that the city could not adopt a charter empowering it to fix the price of that commodity to be furnished its inhabitants. Tacoma Gas, etc., Co. v. Tacoma, 14 Wash. 288; 44 Pac. Rep. 655.

Zanesville Gaslight Company; and in the same year the city of Zanesville authorized this company to lay its pipes in the city's streets and alleys, providing that so long as it enjoyed the privilege granted it should supply the "town council" with gas at a price not to exceed two dollars and fifty cents a thousand cubic feet. At that time the city had no legislative authority to regulate the price of gas. Subsequently the legislature enacted a statute authorizing municipalities to fix the price at which gas should be sold by gas companies; and the city of Zanesville thereafter in 1884 fixed the price to itself and its citizens at one dollar and twenty-five cents per thousand cubic feet. The gas company never accepted the provisions of this last statute nor of this last ordinance. But the Supreme Court held that it could not charge more than the price fixed by the last ordinance, invoking the doctrine of *Munn v. Illinois*,⁶⁵ and holding that it was such a quasi-public corporation, enjoying special privileges of such a public character that its rates were subject to legislative control.⁶⁶ A case in the Federal Circuit Court for the Southern District of Ohio illustrates how far the courts are inclined to go to enable the State or a municipality to regulate the rates of gas or water. On March 18, 1887, the city of Dayton, pursuant to statutes authorizing it to do so, adopted an ordinance giving a natural gas company the right to lay its mains in the streets and supply the inhabitants of the city with gas, giving it eighteen months in which to introduce the gas, and providing that if this was not done by January 1, 1889, the city might, by resolution, declare a forfeiture of the company's franchise. The company accepted the provisions of the ordinance, began to lay its pipes in the streets, but failed to complete the enterprise or to supply gas by January 1, 1889.

⁶⁵ 94 U. S. 113.

⁶⁶ *Zanesville Gaslight Co. v. Zanesville*, 47 Ohio St. 35; 23 N. E. Rep. 60; 23 Wkly. L. Bull. 70; 29 Am. and Eng. Corp. Cas. 190; *State v. Cleveland, etc., Co.*, 3 Ohio Cir. Ct. 251; *State v. Columbus, etc., Co.*, 34 Ohio St. 572; *Toledo v. Northwestern, etc., Co.*, 5 Ohio Cir.

Ct. 557; 3 Ohio Dec. 273; *Toledo v. Northwestern, etc., Co.*, 8 Ohio S. and C. P. Dec. 277; 6 Ohio N. P. 531. See *Spring Valley W. W. v. Schottler*, 110 U. S. 347; *Agua Pura Co. v. Las Vegas*, 10 N. M. 6; 60 Pac. Rep. 208; 50 L. R. A. 224. See also *Tampa v. Tampa W. W. Co. (Fla.)*, 34 So. Rep. 631.

On February 2, 1889, the city declared all its rights forfeited. Meantime, on December 23, 1887, it passed an ordinance fixing the maximum prices the company should have a right to charge for gas furnished for fuel purposes by mixers for the next ensuing five years, which ordinance the company accepted. On March 28, 1889, the name of the company having been changed, the city passed an ordinance granting to it the right to occupy its streets, for the term of twenty years, with the object of furnishing gas "for heating, fuel, and power purposes only"; and in it provided that any consumer should have the right to require gas to be furnished by meter measurement, at a rate not to exceed a certain figure, and not by the former schedule rates, the company to furnish the meter at a rental of three dollars a year, payable in advance. The meter rate was considerably lower than the former rate. A subsequent section provided that "the contract heretofore made between the city and this company, as to schedule of prices, shall be in full force, except as herein altered, and for the unexpired time of said original contract." The contract under the ordinance of December 23, 1887, expired January 10, 1893. Shortly after the company went into the hands of a receiver, who claimed that after January 10, 1893, there was no rate fixed by the council that was operative and in force; and proceeded to carry into effect a resolution of the gas company, adopted in anticipation of the termination of the contract created by the ordinance of December 23, 1887, as modified by that of March 28, 1889, and advanced the rates to nearly double what they had been by the meter measurements. Before any of these ordinances were adopted a statute had been enacted authorizing city councils "to regulate, from time to time, the price" which natural gas companies could charge for natural gas "for lighting or fuel purposes," and providing that the companies could not charge more than the price then fixed. The statute also provided that if the council fixed "the maximum price at which it requires any company to furnish gas to the citizens, or public buildings, or for the purpose of lighting the streets . . . for a period not exceeding ten years, and the company assents thereto by

written acceptance . . . it shall not be lawful for the council to require such company to furnish gas at a less price during the period of time agreed upon, not exceeding ten years as aforesaid." The court held that after the five years' rate expired, as provided for by the ordinance of December 23, 1887, the rates provided by the ordinance of March 28, 1889, were in force. The court adopted the reasoning of the Supreme Court of the State of Ohio, and followed the construction it had given to the statute cited.⁶⁷ On appeal the case was affirmed, the court holding that the provisions for a maximum rate was not a contract for any period, but an exercise of the power to regulate, and a limitation on the license granted, and continued in force after the expiration of the original contract, and until repealed. The court also held that when a municipality is authorized to enter into a contract for a period not to exceed ten years, its contract for twenty years, or for an indefinite time, is entirely void, and that it cannot be sustained as a contract for ten years.⁶⁸

§ 469. Municipality delegating power to change rates.

If a statute (or an ordinance) empowers a municipality to

⁶⁷ *Manhattan Trust Co. v. Dayton Natural Gas Co.*, 55 Fed. Rep. 181.

⁶⁸ *Manhattan Trust Co. v. Dayton*, 59 Fed. Rep. 327; 8 C. C. A. 140; 16 U. S. App. 588.

The case of the *Cleveland Gas-light and Coke Co. v. Cleveland*, 71 Fed. Rep. 610; 35 Ohio L. J. 155, is not so much at variance with the Ohio cases as would at first seem. The gas company's charter dated from 1846, and it was occupying the streets when the constitution of 1850 was adopted, by a provision of which a statute may be enacted to regulate corporations. The syllabus would lead one to think that the court rested its decision upon the unconstitutionality of this statute; but the decision is based upon the fact that the bill for

an injunction charged, which the demurrer admitted, that the price fixed by the municipality was so low that gas could not be manufactured at the figure named. The court said the rates fixed must be reasonable.

An answer of a gas company, denying knowledge of the due and legal passage of an ordinance fixing the price of gas other than averred in the petition, admitting notice of the passage of said ordinance, but averring its non-acceptance and repudiation of the terms and conditions thereof, and its giving notice to the municipality of its rejection of the ordinance, and alleging the invalidity of the ordinance, is not demurrable. *Granville v. Crawford Nat. Gas & Fuel Co.*, 34 Ohio Cir. Ct. R. 256.

fix and regulate rates, the governing body of such municipality, or the body especially authorized to fix or regulate the rate must do it; and the power to fix or regulate it cannot be delegated to any other person or body than the one named in the statute or ordinance. Nor can a contract with a gas company be made that will authorize somebody other than the one named in the statute to regulate the price.⁶⁹ But where the constitution of a State provided that private corporations might be formed under general laws, which laws might be altered or repealed from time to time; and pursuant to its provisions a company was chartered, providing that the rates might be fixed by a board composed of two members appointed by the municipality, two appointed by the company and the fifth by the four; and thereafter a new constitution was adopted providing that the rates should be fixed by the city and county board of supervisors, it was held that the charter was subject to changes according to the rights reserved in the first constitution, and it was not impaired by the last constitution.⁷⁰ Yet where a statute provided "that the board of gas trustees may prescribe by by-laws the price of gas and coke, under such rules and regulations as by ordinance the council may prescribe," it was held that the action of the trustees in raising the price of gas without an ordinance authorizing them so to do was void.⁷¹

§ 470. Annexing territory after contract made.

If a city has a contract with a gas company to supply gas at a certain fixed price, and thereafter extends its limits, the rate so fixed will be applicable to the territory annexed.⁷² Thus where a gas company, pursuant to statutory authority, extend-

⁶⁹ Cincinnati Gaslight and Coke Co. v. Avondale, 43 Ohio St. 257; 1 N. E. Rep. 527. See Schwede v. Heinrich, etc., Co., 29 Wash. 124; 69 Pac. Rep. 362.

⁷⁰ Spring Valley W. W. v. Schottler, 110 U. S. 347; 4 Sup. Ct. Rep. 48; Spring Valley W. W. v. Bartlett, 16 Fed. Rep. 615; Spring Valley W. W. v. San Francisco, 61 Cal. 3.

⁷¹ Foster v. Findlay, 5 Ohio Cir. Ct. 455; 3 Ohio Cir. Dec. 224. But see People's Gaslight & Coke Co., 1941 U. S. 1; 24 Sup. Ct. Rep. 520; 48 L. Ed. 851; Rogers Park Water Co. v. Fergus, 178 Ill. 571; 53 N. E. Rep. 363, and People's Gaslight & Coke Co. v. Hale, 94 Ill. App. 406.

⁷² See People v. Deehan, 153 N. Y.

ing its gas mains into a village where it is vested with the right to lay its mains, and uses such mains to convey to such village gas manufactured by it, and uses its manufactory and mains as one plant, it was regarded as established in the village, within the meaning of a statute giving a municipality power to regulate the price of gas; and such extension of the mains was regarded as the extension of the gas works for supplying the village with gas, within the meaning of a statute authorizing the council "to agree, by ordinance, with any person or persons, for the . . . extension of gas works . . . for supplying the corporation or its inhabitants with gas."⁷³

§ 471. Police power regulations.

As an instance of the exercise of the police power by a municipality, is the removal of a lamp-post where the public convenience requires it, and no contractual relation with the gas company prohibits it. In such an instance the power to remove it may be delegated.⁷⁴ So an ordinance adopted subsequent to the granting of a franchise may provide for an inspection of meters.⁷⁵ So in the case of a water company (and no doubt the same is true of a gas company) a municipality may take such measures as may be necessary to secure pure water, "the pay of its [the company's] just contributions to the public burdens, and the observance of its own ordinances respecting the manner in which pipes and mains of the company should be laid through the streets."⁷⁶

528; 47 N. E. Rep. 787; reversing 11 N. Y. App. Div. 175; 42 N. Y. Supp. 1071.

⁷³ Cincinnati Gaslight and Coke Co. v. Avondale, 43 Ohio St. 257; 1 N. E. Rep. 527. See also Rogers Park Water Co. v. Fergus, 180 U. S. 624; 21 S. Ct. Rep. 490, affirming 178 Ill. 571; 53 N. E. Rep. 563, and People's Gaslight and Coke Co. v. Chicago, 114 Fed. Rep. 384.

⁷⁴ New Orleans Gaslight Co. v.

Hart, 40 La. Ann. 474; 4 So. Rep. 215; 8 Am. St. Rep. 844; 20 Am. and Eng. Corp. Cas. 258.

⁷⁵ Cincinnati, etc., Co. v. State, 18 Ohio St. 237.

⁷⁶ Walla Walla Water Co. v. Walla Walla, 172 U. S. 1; New York v. Squire, 145 U. S. 175; St. Louis v. Western U. Tel. Co., 148 U. S. 92; Missouri, etc., Co. v. Murphy, 170 U. S. 78, affirming 130 Mo. 10; 31 S. W. Rep. 594.

CHAPTER XXI.

CONTRACTS FOR MUNICIPAL LIGHTING.

- § 472. Power to make contract.
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§ 507. Municipal officer interested in contract.

§ 472. Power to make contract.

There has never been any denial of the power of a municipality to make a contract for lighting its streets and public buildings worthy of regard. Whether it is its duty or not to light its streets and public places, the right to make such contracts is unquestioned, whether a statute expressly authorizes it or not. "A municipal corporation," said the Supreme Court of Indiana, "not having either body or limbs, feet or hands, but being merely a legal entity cannot execute its own acts, nor administer its own affairs. To do this it must employ persons, other corporations, or agencies of some kind, and to employ them and agree to pay them is to make a contract; and if it could not make such contracts, and was not bound thereby, it could not carry on the purposes or attain the objects for which it was established. Its ordinances will not execute themselves; and to deny it the power to have them executed would be to render it useless and helpless. When it makes a contract within the scope of its power—not *ultra vires*—which is not against public policy, and not fraudulent, it must be enforced the same as the contract of a business corporation, or a person." When a municipality enters into a contract with an individual or a corporation for the lighting of its streets it acts by its power to contract, and not in its legislative capacity—in its private capacity, as has been said, and not in its public capacity.¹ Offi-

¹ Indianapolis v. Indianapolis Gaslight and Coke Co., 66 Ind. 396; Indianapolis v. Consumers' Gas Trust Co., 140 Ind. 107; 39 N. E.

cers acting under the charter have the power to bind the municipality; and it cannot be urged that they were not officers *de jure*.² The fact that a municipality is authorized to build and maintain a plant of its own does not necessarily prevent it from making a contract for light, and this is true even though in the charter authorizing the building of such a plant is bestowed no specific power to enter into a contract with a company for light. Thus a gas company's statutory charter authorized it to furnish gas to the city for which it was created; and the charter of the city only authorized it to build and maintain a gas plant; and yet it was held that the city could bind itself by a contract with the company for lighting the streets.³ Inasmuch as entering into a contract for lighting the streets is not the exercise of legislative power, the contract

Rep. 433; 27 L. R. A. 514; 48 Amer. and Eng. Corp. Cas. 151; San Francisco Gas Co. v. San Francisco, 9 Cal. 453; Richmond County Gas Co. v. Middleton, 59 N. Y. 228; Harlem Gaslight Co. v. Mayor, 33 N. Y. 309, affirming 3 Robt. 100; Davenport Gaslight Co. v. Davenport, 13 Ia. 229; State v. Milwaukee Gaslight Co., 29 Wis. 454; 9 Am. Rep. 598; Norwich Gaslight Co. v. Norwich City Gas Co., 25 Conn. 19; Philadelphia v. Fox, 64 Pa. St. 169; Garrison v. Chicago, 7 Biss. 480; Nebraska City v. Nebraska, etc., Co., 9 Neb. 339; 2 N. W. Rep. 870; Keihl v. South Bend, 76 Fed. Rep. 921; 44 U. S. App. 687; 22 C. C. A. 618; 36 L. R. A. 228; Waymart Water Co. v. Waymart, 4 Pa. Super Ct. 211; Winfield v. Winfield Gas Co., 37 Kan. 24; 14 Pac. Rep. 499; Conyers v. Kirk, 78

Ga. 480; 3 S. E. Rep. 442; Anoka W. W., etc., Co. v. Anoka, 109 Fed. Rep. 580; Crowder v. Sullivan, 128 Ind. 486; 28 N. E. Rep. 94; 13 L. R. A. 647; Gosport v. Pritchard, 156 Ind. 400; 59 N. E. Rep. 1058; Seward v. Liberty, 142 Ind. 551; 42 N. E. Rep. 39; Gaslight, etc., Co. v. New Albany, 156 Ind. 406; 59 N. E. Rep. 176; Public Service Corp. v. American Lighting Co., 67 N. J. Ch. 122; 57 Atl. Rep. 482; Cumberland Gas Co. v. West Va. & Md. Gas Co., 188 Fed. 585, affirming 182 Fed. 667.

² Lake Charles Ice, etc., Co. v. Lake Charles, 106 La. 65; 30 So. Rep. 289.

³ Newport v. Newport Light Co., 11 Ky. L. Rep. 840; Indianapolis v. Indianapolis, etc., Co., *supra*; Swann v. City of Murray, 146 Ky. 148; 142 S. W. 244.

need not be by formal ordinance or resolution.⁴ A statute authorizing a municipality to grant a franchise to a company, does not empower it to a franchise to an individual.^{4a}

§ 473. Constitutional or statutory limitations on indebtedness.

Constitutional or statutory provisions forbidding municipalities contracting a debt beyond a certain amount or percentage of its assessable property are not uncommon, and must be considered in entering into a contract for light. If the entire amount a city will pay on a twenty years' contract for light must be considered a debt of the city when the contract is entered into,

⁴ *Gosport v. Pritchard*, 156 Ind. 400; 59 N. E. Rep. 1058.

Power in a city to furnish water to its inhabitants and control the erection of waterworks for that purpose, is sufficient to authorize the city to enter into a contract for water and to grant a franchise for such purpose. *Anoka W. W., etc., Co. v. Anoka*, 109 Fed. Rep. 580.

In New Jersey before a city can let a lighting contract it must first establish a system of street lighting, under a statute providing that it "shall have power to establish, publish, modify, amend, or repeal ordinances, rules or regulations, and by laws," "to provide lamps and gas fixtures, and to light the streets, parks, and public places of every description in" the city. *Taylor v. Lambertville* (N. J.), 10 Atl. Rep. 809.

A statute may give the courts power to reform a city's contract.

Du Bois v. Du Bois, etc., Co., 176 Pa. St. 430; 35 Atl. Rep. 248; 38 W. N. C. 417; 34 L. R. A. 92.

Vote to levy tax, see *Baltimore, etc., Co. v. People*, 200 Ill. 623; 66 N. E. Rep. 246.

In the absence of statutory power a city has no power to grant a franchise to construct a gas plant for furnishing light, heat and power, and to grant the right to pipe the streets for distribution of the gas to consumers. *Elizabeth City v. Banks*, 150 N. C. 407; 64 S. E. Rep. 189.

A company asking a franchise from a city is chargeable with knowledge of the disabilities, arising from differences with the company controlling the gas supply, to fulfill the contract. *Public Service Corp. v. American Lighting Co.*, 67 N. J. Ch. 122; 57 Atl. Rep. 482.

^{4a} *Henry v. Bartlesville Gas & Oil Co.*, 33 Okl. 473; 126 Pac. 725.

then many a city is so indebted that it cannot enter into such a contract, where such constitutional or statutory provisions prevail; but where each year's supply of light is to be paid for at the end of the year, and that is to be considered the extent of the city's debt — a debt not arising until the end of the year — a very different phase of the situation is presented. These provisions are, of course, not identical in language, although the same idea runs through them. A provision of the constitution of Indiana provides that no municipal corporation "shall ever become indebted in any manner or for any purpose, to an amount, in the aggregate exceeding two per centum on the value of the taxable property within such corporation, to be ascertained by the last assessment for State and county taxes previous to the incurring of such indebtedness." A city entered into a twenty-year contract for water, the rent payable annually. The aggregate amount of rent to be paid under this contract exceeded two per centum of the assessed value of the property within the city; but an annual payment fell below that amount. The contract was held to be valid. "If the aggregate sum of all the yearly rents," said the court, "is to be taken as a debt within the meaning of the constitution, then many cities will be left without the means of procuring things so essential to public welfare and safety. We are not to presume, unless coerced by the vigor of the words, that the framers of the amendment, or the electors who voted for it, intended to destroy the corporate existence of our municipalities or to leave them without water or light. Nor are we to presume that the electors were ignorant of the existence, condition and necessities of our great towns and cities. On the contrary, we are to presume these things were known to the electors, and that they intended to foster the best interests of these instruments of local government. . . . To deny the right to procure light and water is to deny it to the inhabitants of the towns and cities, and these form no inconsiderable part of the population of the State. We cannot, therefore, by mere intendment declare that the electors of the State meant to lay down a rule that would practically take from the inhabitants of our cities the power to supply themselves with

water or light. To reach the conclusion that they meant to do this, we must find clear warrant in the language of the constitutional provision itself." "It is clear that if the city," continues the court, "should fail to perform its contract, the recovery would be for damages for a breach of contract, and not the contract rate of compensation, and, therefore, it cannot be true that the whole of the compensation is certainly demandable by the corporation with which it contracts. It may be that but a small part of even one year's compensation can be recovered. On the other hand, the failure of the water company to perform may put an end to the contract, and that would, of course, terminate all liability of the municipal corporation. There could be no action maintained against the city for the recovery of compensation under the contract without evidence that the water had been furnished, and this proves that there is no indebtedness until the water has been supplied in accordance with the terms of the contract. The effect of the proposed contract is that the city shall be liable for water as it is furnished and not before. It is not until after the water has been furnished that there can be justly said to be a debt, for, while there might be a liability for damages, in case of a breach on the part of the city, there is certainty none under the contract until the city has received that for which it contracted. If it can pay this indebtedness when it comes into existence, without exceeding the constitutional limitation, then there is no violation of the letter, and surely none of the spirit of the constitution. We are careful to say that when the debt comes into existence, and not to say when it becomes due, for between these things there is an essential difference. The object to be accomplished by the amendment, the condition and necessities of the municipalities, as known to the authors of the amendment, and the just force of the language employed, authorize us to conclude that the inhibition of the constitution does not apply to contracts for water to be paid for as the water is furnished, provided it is shown that the contract price can be paid from the current revenues as the water is furnished and without increasing the corporate indebtedness beyond the constitutional

limit.”⁵ The Supreme Court of Illinois has used the following language concerning a contract for gas: “The contract was for the furnishing of an article for nightly consumption, by the city during a period of thirty years, fixing the price at which the article should be furnished. There was no indebtedness in advance of anything being furnished, but indebtedness arose as gas should have been furnished along from night to night during the period of thirty years. The contract provides for the payment monthly, at the end of each month that became due for the month then ended. When the company has furnished the gas for a certain month, then there is a liability — an indebtedness arises — and not before, as we conceive. Hence the amounts that might become due and payable under the contract in future years, did not constitute a debt against the city at the time of entering into the contract, within the meaning of the constitution.”⁶ But a contract for a gas plant to be leased by the city, which increases the city’s indebtedness beyond the constitutional limit is void, although merely executory;⁷ and so is a contract whereby a city agrees to pay a definite sum on the completion of water works or a gas plant.⁸ But an ordinance providing that any unexpended appropriations left

⁵ Valparaiso v. Gardner, 97 Ind. 1; 49 Am. Rep. 416; Sackett v. New Albany, 88 Ind. 473; 45 Am. Rep. 467; South Bend v. Reynolds, 155 Ind. 74; 57 N. E. Rep. 706.

⁶ East St. Louis v. East St. Louis, etc., Co., 98 Ill. 415; Dively v. Cedar Falls, 27 Ia. 227; Grant v. Davenport, 36 Ia. 396; French v. Burlington, 42 Ia. 614; Burlington Water Co. v. Woodward, 49 Ia. 58; City Water Supply Co. v. Ottumwa, 120 Fed. Rep. 309; State v. McCauley, 15 Cal. 429; People v. Pacheco, 27 Cal. 175; Crowder v. Sullivan, 128 Ind. 486; 28 N. E. Rep. 94; 13 L. R. A. 647; Lamar Water, etc., Co. v. Lamar, 140 Mo. 145; 39 S. W. Rep. 768; Creston W. W. Co. v. Creston, 101 Ia. 687; 70 N. W. Rep. 739; Keihl v. South Bend, 76 Fed. Rep. 921; 22 C. C. A. 618; 44 U. S. App.

687; 36 L. R. A. 228; Hay v. Springfield, 64 Ill. App. 671; Gold v. Peoria, 65 Ill. App. 602; Winston v. Spokane, 12 Wash. 524; 41 Pac. Rep. 888; Brown v. Corry, 175 Pa. St. 528; 34 Atl. Rep. 854 (affirming 4 Pa. Dist. Rep. 645; 17 Pa. Co. Ct. Rep. 490); State v. Quayle, 26 Utah 26; 71 Pac. Rep. 1060; New Orleans Gaslight Co. v. New Orleans, 42 La. Ann. 1 18; 7 So. Rep. 559; Walla Walla Water Co., 172 U. S. 1; 19 Sup. Ct. Rep. 77. See Appeal of City of Erie, 91 Pa. St. 398; Gosport v. Pritchard, 156 Ind. 400; 59 N. E. Rep. 1058.

⁷ Spilman v. Parkersburg, 35 W. Va. 605; 14 S. E. Rep. 279.

⁸ Culbertson v. Fulton, 127 Ill. 30; 18 N. E. Rep. 781.

at the end of each year shall be used to pay for a plant purchased of a lighting company, if the city elects to purchase it; and in case of a purchase the acceptance shall create no indebtedness against it in favor of the company, is valid; for in that case there is no debt against the city.⁹ If at the time a city enters into a contract for light, to run over a long series of years, the indebtedness of such city is not so great as to prohibit it; and before it expires the debt so increases as to exceed the limit of an annual installment falling due, such installment cannot be collected from it, and the claim for it is void.¹⁰

§ 474. Length of term of contract.

Elsewhere, under the head of Monopolistic Grants and Monopolistic Contracts, is treated the power of a municipality to bind itself in perpetuity or for a long term of years to take gas from a gas company; and it is not necessary to repeat here what is said there. Suffice to say here, that when a statute provides that a municipality may enter into a contract for the lighting of its streets for a certain number of years, it cannot exceed the limitation thus imposed upon it. If the municipality undertakes to enter into a contract for a longer period than the statute authorizes, that fact will not, it has been held, render it invalid; but it will be valid for the time such munici-

⁹ Hay v. Springfield, 64 Ill. App. 671; Lapore v. Gamewell Co., 146 Ind. 466; 45 N. E. Rep. 588.

¹⁰ Keihl v. South Bend, 76 Fed. Rep. 921; 44 U. S. App. 687; 22 C. C. A. 618; 36 L. R. A. 228.

As to waiver of a statutory provision prohibiting an indebtedness, see Bronx Gas, etc., Co. v. New York, 17 N. Y. Misc. 433; 41 N. Y. Supp. 358.

In Georgia the rule was said to be ascertained by adding to the principal of all outstanding indebtedness the amount of all accrued interest that may be past due and payable on the day the amount of the debt is to be fixed. In ascer-

taining the amount of such debt, future interest which is not due on the day it becomes necessary to fix the sum of indebtedness is not to be counted. Unearned interest is not, within the true intent and meaning of the constitution, a part of the debt of the city. Epping v. Columbus, 117 Ga. 263; 43 S. E. Rep. 803, citing Dawson v. Water Works Co., 106 Ga. 696; 32 S. E. Rep. 907; Colson v. Portland, Fed. Cas. 3275; Board v. Hopkinsville, 95 Ky. 239; 24 S. W. Rep. 872; 44 Am. St. Rep. 222; 23 L. R. A. 402; Culbertson v. Fulton, 127 Ill. 30; 18 N. E. Rep. 781; Springfield v. Edwards, 84 Ill. 626.

pality is authorized to make the contract. Thus where a municipality was empowered to enter into a contract for the furnishing of water for twenty years, and did so; but it was also provided in the contract that it should remain in full force for an additional twenty years, if the municipality did not purchase the water works before the expiration of the first term, it was held to be a valid contract for the original term of twenty years.¹¹ A statute authorizing municipal authorities to enter into a contract for water from year to year does not require them to make a new contract every year, but they may enter into one for a term of years — as for twenty years.¹² So where a city entered into a contract for twenty-one years, to furnish the city with water; and the company at great expense built water works and maintained them for four years; and the city levied the proper tax and paid the hydrant rental for three years, and otherwise recognized the validity of the contract; it was declared that the contract would not be held void for the reason that it exceeded the length of time allowed by statute, but it would be upheld for a reasonable time, the circumstances and condition of the city as to population and assessed valuation being substantially the same, and no other better facilities being offered upon more reasonable terms.¹³ It is no objection to the contract that the term begins in the future, or even that it does not begin until after the terms of the councilmen authorizing it has expired.¹⁴ But the proposition that a contract exceeding the cess of time, has not met with favor from all the courts. Thus in Ohio it has been held that such a contract is void, absolutely. "The language of the statute is," said the Supreme Court of

¹¹ *Neosho City Water Co. v. Neosho*, 136 Mo. 498; 38 S. W. Rep. 89; *State v. Ironton Gas Co.*, 37 Ohio St. 45.

¹² *Light, Heat, etc., Co. v. Jackson*, 73 Miss. 598; 19 So. Rep. 771.

¹³ *Columbus Water Co. v. Columbus*, 48 Kan. 99; 28 Pac. Rep. 1097.

¹⁴ *Logan Natural Gas Co. v. Chil-*

licothe, 65 Ohio St. 186; 62 N. E. Rep. 122.

Where a contract was made for twenty years, instead of ten, as it should have been, in which rates were agreed upon; it was held that at the end of the first ten years the municipality could regulate the rates. *State v. Ironton Gas Co.*, 37 Ohio St. 45.

that State, "that the municipality shall not have power to contract for any light for any term not exceeding ten years. This implies, with as much force as if it had been expressly stated, that the municipality shall not have power to contract for any longer than ten years, and the natural inference is, we think, that the purpose is to inhibit such contracts entirely, for the only certain way of insuring their non-enforcement is to prevent their attempted execution. This may not be effectually done unless they are held to be void."¹⁵ This rule has been followed in Indiana.¹⁶ In this Indiana case a contract was entered into in 1870 for gas for a period of twenty years beginning in 1871, and providing that at the end of that period the city "will either purchase from the said gas company . . . their gas works, pipes, meters and other property at the fair and reasonable value thereof at that time, or grant them the same right and privileges as contained in this ordinance for another term of not less than twenty years, but subject, however, to such other reasonable conditions as the interest of said city, and of her citizens, may at that time require." In 1883 the legislature enacted a statute prohibiting a city entering into a contract for light for a term exceeding ten years in duration; and in 1888, three years before the first twenty years' period had expired, the city entered into a contract, supposed to be in pursuance of the terms of the first ordinance noted, for gas for a term of twenty-three years. This last contract was held to come within the prohibition of the statute referred to.¹⁷ Of contracts extending over a long term of years,

¹⁵ *Wellston v. Morgan*, 59 Ohio St. 147; 52 N. E. Rep. 127.

¹⁶ *Gaslight, etc., Co. v. New Albany*, 156 Ind. 406; 59 N. E. Rep. 176. See also to the same effect *Manhattan Trust Co. v. Dayton*, 59 Fed. Rep. 327; 8 C. C. A. 140; *State v. Harrison*, 46 N. J. L. 79; *Somerset v. Smith*, 20 Ky. Law Rep. 1488; 49 S. W. Rep. 456.

¹⁷ A contract for twenty-one years was held not to be an abuse of discretion on the part of the city coun-

cil. *Illinois Trust and Savings Bank v. Arkansas City*, 76 Fed. Rep. 271; 22 C. C. A. 171; 34 L. R. A. 518; *Adrian W. W. v. Adrian*, 64 Mich. 584; 31 N. W. Rep. 529 (a thirty-year contract construed).

A power to enter into a contract for gas "and to cause the annual expense thereof" to be certified to a proper board, limits the power to make only one year contracts. *Taylor v. Lambertville* (N. J.), 10 Atl. Rep. 809; *Atlantic City W. W. Co.*

the Supreme Court of Indiana said: "It may be true that the contract creates an obligation for a breach of which an action for damages will lie, but it does not create a right of action for the unearned compensation. The earning of each year's compensation is essential to the existence of a debt. If municipal corporations cannot contract for a long period of time for such things as light or water, the result would be disastrous, for it is a matter of common knowledge that it requires a large outlay to provide machinery and appliances for supplying towns and cities with light and water, and that no one will incur the necessary expense for such machinery and appliances if only short periods are allowed to be provided for by contract. The courts cannot presume that the legislature meant to so cripple the municipalities of the State as to prevent them from securing light upon reasonable terms, in the ordinary mode in which such a thing as electric light or gas is obtained."¹⁸

§ 475. No term fixed in ordinance or contract.

Almost invariably the contract between a municipality and a gas company for a supply of gas, or a franchise granting a right to occupy the streets for the purpose of supplying gas to its inhabitants, is limited in duration of time; but if there be no limitation in length of time, then the contract or franchise may be terminated by either the municipality or the gas company at any time. The gas company, may, therefore, voluntarily forfeit its right to exercise its privileges within the municipality and withdraw therefrom; but so long as it continues to exercise any of its franchises within the municipality, it may be compelled to exercise them fairly and without discrimination.^{18a}

v. Reed, 50 N. J. L. 665; 15 Atl. Rep. 10. See *Harlem Gaslight Co. v. New York*, 33 N. Y. 309, affirming 3 Robt. 100.

¹⁸ Crowder v. Sullivan, 128 Ind. 486; 28 N. E. Rep. 94; 13 L. R. A. 647; *Foland v. Frankton*, 142 Ind. 546; 41 N. E. Rep. 1031. See *Edison Electric, etc., Co. v. Jacobs*, 8 Kulp 120; *Black v. Chester*, 175 Pa. St. 101; 34 Atl. Rep. 354;

Hartford v. Hartford, etc., Co., 65 Conn. 324; 32 Atl. Rep. 925; *Denver v. Hubbard*, 17 Colo. App. 346; 68 Pac. Rep. 993; *Southwest, etc., Co. v. Joplin*, 113 Fed. Rep. 817.

^{18a} *East Ohio Gas Co. v. Akron*, 81 Ohio St. 33; 90 N. E. Rep. 40.

Where a city adopted an ordinance for the sale at public bidding of a franchise for supplying gas for twenty years from the date of the ac-

§ 476. Extending term of contract.

The municipality may extend the term of a contract, so long as it keeps within the statutory period, and the gas company will agree to the extension; and such extension is not void on the ground that it is against public policy, where the city is authorized by the statute to light its streets. No fraud is implied in such a contract on the ground that the city cannot decrease the number of lamps during the term.¹⁹ Where a contract was for one year, entered into in 1856; and from time to time new contracts, not always in writing, were entered into, but the company continued to furnish gas and the city to pay for it according to the last written contract until a new one was executed, until 1884, when the last one was executed, which expired October 1, 1885; it was held that the gas furnished for one year after the last written contract expired must be paid for according to the terms of such contract, and that a statute forbidding the city to enter into a second contract with a company for gas to be furnished while a contract was in force applied to a second contract with another company for gas during the year 1886.²⁰ A gas company made a contract with a city to light its streets "for the term of five years, from the 1st day of July, 1905; it being mutually understood that this contract shall continue for another term unless official notice be given to the other sixty days before its expiration." No official notice was given to terminate the contract. The city sought to prove a waiver of the sixty day official notice by showing an unaccepted proposition offered to the company suggesting changes and economies in the lighting system and an unaccepted offer to change the existing contract; the drafting of a proposed unadopted lighting ordinance drawn by the company's attorney at the suggestion of a city commissioner and pursuant to an agreement at a conference in the mayor's office; the company's participation in a competitive exhibition of street lighting systems at the city's invitation which recited that the city's street lighting contract would soon expire; the company's participation in competitive bidding for a new contract for street lighting; and a voluntary, unauthorized statement by the company's attorney (and unaccepted by the city) that if a new contract was awarded to another lighting company the present company would continue its lighting service until the new company's lighting system was installed. It was held that these incidents did not establish a voluntary or intentional waiver of the company's contract right

ceptance of the bid, and providing that the successful bidder should not be required to furnish gas until about two years later, it was held that the franchise began from the date of the contract and not from the date the bidder was required to furnish gas; and that the grant was valid. *Truesdale v. Newport*

(Ky.), 90 S. W. Rep. 589; 28 Ky. L. Rep. 840.

¹⁹ *Parfit v. Furguson*, 38 N. Y. Supp. 466; 3 N. Y. App. Div. 176; 73 N. Y. St. Rep. 621; affirmed 159 N. Y. 111; 3 N. E. 707.

²⁰ *Taylor v. Lambertville*, 43 N. J. Eq. 107; 10 Atl. Rep. 809.

to an official sixty days' notice to terminate its existing contract, and that these incidents did not mislead or prevent the city giving the requisite notice, and did not estop the company to recover on its contract for services to the city, and for the city's breach of the contract.^{20a}

§ 477. Bids for lighting.

Unless the provisions of the municipality's charter requires it, or some statute, the contract need not be let by advertising for bids, and if bids are advertised for, it need not be let to the lowest bidder, especially if the right to choose among the bidders is reserved.²¹ The letting of bids is a judicial act, and no action lies for damages against a board of aldermen for their failure or refusal to award to a company the contract for lighting a city.²² If a city formally reject a bid it cannot afterwards accept it and bind the bidder.²³ Specifications in an advertisement for bids, some of which are for proposals to light a city as it is lighted at the time bids are asked, while others call for light on any other plan, subject to the condition of furnishing lights of 2,000 candle power, are sufficiently definite, and need not be more explicit.²⁴ The mere fact that a bidder has put in the lowest bid does not constitute an award of the contract to him, where the statute provides that "if the lowest bidder shall refuse or neglect, within five days after due notice that the contract has been awarded, to execute the same, the deposit made by him shall be forfeited to the city."²⁵ Competitive bidding need not be asked under the charter of Greater New York before entering into a contract for a supply of water to the municipality.²⁶ If a contract provides for an increase of the number of lights at a fixed price per light upon demand of the city, it is not necessary to advertise for bids concerning the extra lights.²⁷

^{20a} Welsbach Street Lighting Co. v. Wichita (Kan.), 168 Pac. 1090.

²¹ Harlem Gaslight Co. v. Mayor, 33 N. Y. 309, affirming 3 Robt. 100.

²² East River Gaslight Co. v. Donnelly, 25 Hun 614; Gaslight Co. v. Donnelly, 93 N. Y. 557; People v. Gleason, 121 N. Y. 631; 25 N. E. Rep. 4.

²³ Brush Electric Light Co. v. Cincinnati, 28 Wkly. Law Bull. 29; 27 Wkly. L. Bull. 412; 11 Ohio Dec. 581. If the city endeavors to assign the certificate of deposit accompanying the rejected bid, an injunction will lie to prevent it doing so.

²⁴ Detroit v. Hosmer, 79 Mich. 384; 44 N. W. Rep. 622.

²⁵ Erving v. New York City, 131 N. Y. 133; 29 N. E. Rep. 1101, affirming 16 N. Y. Supp. 612.

In Georgia a city can make a cash contract for current supplies—

such as lamps and gasoline—for lighting streets through its appropriate officers without a formal resolution entered on its minutes. Conyers v. Kirk, 78 Ga. 480; 3 S. E. Rep. 442.

²⁶ Gleason v. Dalton, 28 N. Y. App. Div. 555; 51 N. Y. Supp. 337; 85 N. Y. St. Rep. 337; reversing 23 N. Y. Misc. 18; 50 N. Y. Supp. 90.

²⁷ Bronx Gas, etc., Co. v. New York, 17 N. Y. Misc. 433; 41 N. Y. Supp. 358.

As to bidding contracts and the failure to accept them, see Vincennes v. Citizens' Gaslight Co., 132 Ind. 114; 31 N. E. Rep. 573; 16 L. R. A. 485; Searle v. Abraham, 73 Ia. 507; 35 N. W. Rep. 612.

An ordinance calling for bids must be literally complied with by the city, by inserting the requisite number of notices in a newspaper calling for bids. Taylor v. Lam-

§ 478. How contract executed.

As a rule, there is nothing peculiar about a lighting contract with a municipality different from other contracts, aside from the right to occupy the streets with gas mains or pipes. Usually, however, these contracts, evidenced by an ordinance adopted by the common council or board of trustees, specifically setting forth the terms of the contract, requires an acceptance in writing on the part of the gas or water company. But there is nothing to prevent the ordinance being binding, although the company does not accept its terms in writing, if it in fact accepts its terms by acting under it; and this is true even though the ordinance provides for a written acceptance; for in such an instance the municipality waives a written acceptance by permitting the company to go on and comply with the provisions of the contract without first requiring a written acceptance. The common council or board of trustees may confer authority upon a municipal officer to execute the contract, where no positive statute prevents it; especially where it reserves the right to approve it after it is formally signed. In such an instance as the latter one the approval of the mayor is not necessary.²⁸ Under a statute that the board of street commissioners shall

bertville, 43 N. J. Eq. 107; 10 Atl. Rep. 809.

The constitution of California provides that any person may use the streets of a city, under proper regulations as to damages and charges, while there is no city plant for supplying light. A statute provides that every franchise to erect poles or wires for electric lighting shall be advertised and sold to the highest bidder. In view of these provisions, it was held that the statutory requirement of advertising and sale was unconstitutional as applied to cities having no municipal plant, for the highest bidder at the sale would necessarily take an exclusive franchise, while the constitution required competition. *Pereria v. Wallace*, 129 Cal. 397; 62 Pac. Rep. 61.

Where a statute requires bids, before granting a franchise for a term of years; and it must award the

contract to the highest and best bidder, a city cannot enlarge a franchise already granted, except by award to the highest and best bidder. *People's El., etc., Co. v. Capital Gas, etc., Co.*, 116 Ky. 76; 75 S. W. Rep. 280; 25 Ky. L. Rep. 327.

A contract between a city of the second class and a gas company for a supply of gas for a municipal hospital, awarded without previous advertisement and without competitive bidding, is void, where there were other companies furnishing gas in the city, though the other companies to have fulfilled the contract would have had to lay pipe for some distance. *Philadelphia Co. v. Pittsburgh*, 253 Pa. St. 147; 97 Atl. Rep. 1082.

²⁸ *San Francisco Gas Co. v. San Francisco*, 6 Cal. 190; *Lake Charles, etc., Co. v. Lake Charles*, 106 La. 65; 30 So. Rep. 289; *Gosport v.*

superintend and provide for lighting street lamps, and repair them, it has power to make a contract with a company for gas at a fixed rate, where it acts under the authority of the city council, the charter providing that it shall cause to be executed all orders of such council.²⁹

§ 479. Liability of city for breach of contract.—Damages.

If a municipality fails to keep its contract with the company contracting to supply it with gas, it is liable in damages for the breach. But the company cannot recover the price of gas not furnished, although it was not its fault that the gas was not furnished. Nor is it any defense for the municipality that it is unable to pay for the gas it has contracted to take; nor can it annul the contract for that reason, much less at its own

Pritchard, 156 Ind. 400; 59 N. E. Rep. 1058; Logansport v. Dykeman, 116 Ind. 15; 17 N. E. Rep. 587.

If the mayor can veto the ordinance, he must do so within the time fixed by statute. *Pennsylvania Globe Gas Co. v. Scranton*, 97 Pa. St. 538.

²⁹ *Hartford v. Hartford Electric Light Co.*, 65 Conn. 324; 32 Atl. Rep. 925.

An ordinance providing for water for a city to be furnished by a private corporation at an annual rental, payable quarterly for thirty years, is a contract for such times as the city may request water to be furnished, the taking being optional with the city, for the purpose of determining the amount of the city's indebtedness. *Gold v. Peoria*, 65 Ill. App. 602.

An agreement by a board of improvement of a town with a gas company that such board will not give its consent to any other company to lay its pipes in the streets does not prevent other officers becoming vested with the power to determine whether leave shall be granted to other companies to lay pipes in the streets for exercising the power. *Parfitt v. Ferguson*, 159 N. Y. 111; 53 N. E. Rep. 707; affirming 38 N. Y. Supp. 466; 3 N. Y. App. Div. 176.

A city common council, having the power to confer a franchise on a gas company, by passing resolutions contemplating and providing for execution of contracts with a gas company for lighting the city, gives the consent requisite to confer a franchise on the company. *People v. Littleton*, 110 N. Y. App. Div. 728; 96 N. Y. Supp. Rep. 444.

If a statute provides that an ordinance shall not embrace more than one subject, which shall be expressed in its title, an ordinance, which in its title and body provides for the letting of franchises to supply the city with light, heat, and power by means of either gas, hot water and steam, is void. *Silva v. Newport*, 119 Ky. 587; 84 S. W. Rep. 741; 27 Ky. L. Rep. 212.

Power of officers of a corporation to enter into a contract to supply gas. *Minnetonka Oil Co. v. Cleveland, etc.*, Co., 27 Okl. 180; 111 Pac. Rep. 326.

A formal acceptance by the gas company of an ordinance containing a contract for furnishing gas is unnecessary to bind it concerning rates, where it has enjoyed all the privileges granted for a term of years, during which the charges were made in accordance with the rates prescribed. *Moline v. Moline, etc.*, Co., 89 Kans. 670; 131 Pac. 1189.

will.³⁰ For a failure to take gas the company recovers what profits it would have made under the contract during the time it was not allowed to furnish the gas, or, in other words, the difference between the cost of furnishing it and its value according to the terms of the contract.³¹ But an ordinance may be so worded that there is no contract to take any specific quantity; in which event the city will not be liable for a refusal to take gas. Thus where an ordinance gave a gas company the right to occupy the streets with its pipes and mains, providing that it should furnish "good, pure gas for all the public lamps of the city, and light, extinguish and keep them in good repair," at a fixed price per annum per lamp; and also provided that the city council should "have the right at all times to regulate the times of lighting and extinguishing the street lamps, and of determining the quantity of gas to be consumed by the city"; it was held that there was no express contract by the city, under the ordinance to take any quantity of gas; and that an action for damages could not be maintained against the city for a failure to take it.³² The action of a city does not always amount to a rescission of the contract; as where a city was to take gas, at a stated price per month, and it undertook to rescind the contract by a resolution of the council, approved by the mayor, declaring the contract to be at an end, and notifying the company of its action. This was considered not to be a rescission of the contract, for the gas company had not assented to it; but only a breach of it, for which the

³⁰ *Davenport Gaslight and Coke Co. v. Davenport* 13 Ia. 229; *Gosport v. Pritchard*, 156 Ind. 400.

³¹ *Davenport Gaslight and Coke Co. v. Davenport*, 15 Ia. 6.

In this case litigation having arisen between the city and company to determine the validity of the contract, it was agreed between them that the company should have the privilege of shutting off the gas from the city lamps until the question of the validity of the contract should be determined by

the courts, and that no existing right should be prejudiced or affected, but the contract should, if valid, remain to the same extent as though the company had not shut off the gas. It was held that this special agreement did not prevent the company from recovering of the city damages for the breach of the original contract, it having been declared valid.

³² *Gaslight and Coke Co. v. New Albany*, 156 Ind. 406; 59 N. E. Rep. 176.

company could recover from the city, in a proper action, adequate damages.³³

§ 480. Failure of grantee of franchise to carry out its provisions.

In the past it was nothing uncommon for a corporation or individuals to secure a grant of the privilege to lay its pipes in the streets of a municipality and to furnish its inhabitants with gas; and then fail to carry out any of its provisions. Few if any actions for damages have ever been brought because of a breach of such contracts. In granting the privilege to furnish its inhabitants with gas, a municipality acts in a governmental capacity in which it has no private interest; and hence the municipality as a governmental agency, nor the inhabitants suffer damages capable of ascertainment because of the failure of the grantee to perform their franchise obligations.^{33a}

³³ *Nebraska City v. Nebraska City, etc., Co.*, 9 Neb. 339; 2 N. W. Rep. 870.

Where a statute provided a commission who should fix the price of gas for a city whenever called upon, after an investigation duly had, it was held that a city failing to apply to the commission to fix a rate could not decline to pay for the gas it received, and could not secure an injunction to prevent the turning off the gas, unless it paid the admittedly just rates for such gas as it received. *Buffalo v. Buffalo Gas Co.* (N. Y.), 112 N. Y. Supp. 468.

Under Minnesota laws, 1856, p. 87, c. 53, § 9, the city of St. Paul must pay the St. Paul Gaslight Company eight per cent. of the cost of erection by it of lamps in the streets, while the lamps are in actual service. *St. Paul Gaslight Co. v. St. Paul*, 91 Minn. 521; 98 N. W. Rep. 868.

If the contract with a city is to

furnish gas so much per lamp, the gas company cannot insist that it be paid so much per cubic foot. *Public Service Corporation v. American Lighting Co.*, 67 N. J. Ch. 122; 57 Atl. Rep. 482.

In a gas company's action against a city for gas furnished a municipal hospital, it was held that the hospital was a "city property department," and under the company's franchise to be furnished gas free of cost. *Philadelphia Co. v. Pittsburgh*, 247 Pa. 542; 97 Atl. 614.

^{33a} *Marshall v. Atkins* (Tex. Civ. App.), 127 S. W. Rep. 1148.

Work done by the grantee of the franchise is not a part performance available to him in an action on a bond given to secure commencement of operations on the plant, if the work has been abandoned before any part of the real object was accomplished; nor is it any defense to such action that a reinstatement of a franchise had been granted to

§ 481. Assignment of lighting contract.

A distinction must be borne in mind between a contract to furnish light to a city, and the grant of a right to lay pipes in its streets and maintain a lighting plant. The distinction may often seem shadowy, but it is in this way that the many seemingly conflicting cases can be reconciled. Usually lighting contracts, either in direct or indirect terms, provide that they may be assigned; and this is not uncommon with the grant of privileges to occupy the streets—a franchise as it is often called. A contract or ordinance giving the right to the contractor or grantee to assign or transfer the contract or grant is valid.³⁴ So such contracts or grants seem to be assignable in some jurisdictions without express words in relation thereto, or without a statute expressly authorizing it.³⁵ It has been said that even an exclusive franchise may be assigned.³⁶ And under a statute

another rival company in violation of a grant of an exclusive privilege to the defendant, where the constitution of the State forbade the granting of such a privilege. *Grayson v. Marshall* (Tex. Civ. App.), 145 S. W. 1034.

³⁴ *State v. Laclede Gaslight Co.*, 102 Mo. 472; 14 S. W. Rep. 974; 15 S. W. Rep. 383; 34 Am. and Eng. Corp. Cas. 49; *Los Angeles v. Los Angeles Water Co.*, 177 U. S. 558; 19 Sup. Ct. Rep. 77; *Pittsburgh Carbon Co. v. Philadelphia Co.*, 130 Pa. St. 438; 18 Atl. Rep. 732.

The holder of a fifty-year franchise to furnish natural gas to the inhabitants of a city and a gas corporation, owning gas wells and a system for distribution in the city, contracted to furnish gas to lighting corporation, authorized to furnish gas for domestic uses, and to buy and sell gas, for forty-nine years, the balance of the life of the franchise. The contract provided that the lighting corporation should, during the life of the contract, enjoy

the privileges conferred by the ordinance granting the franchise, and should have the exclusive right to dispose of gas within the city, etc. It was held that the contract was in effect an assignment of the franchise to the lighting corporation, so as to give it the exclusive right to distribute gas in the city. *Ft. Smith Light & Traction Co. v. Kelley*, 94 Ark. 461; 127 S. W. Rep. 975.

Assignment of contract to supply gas. *Minnetonka Oil Co. v. Cleveland, etc., Co.*, 27 Okl. 180; 111 Pac. Rep. 326.

³⁵ *San Luis Water Co. v. Estrada*, 117 Cal. 168; 48 Pac. Rep. 1075. The entire property, franchises and privileges cannot be transferred by sale or lease for the life of the corporation; and the company thus incorporated abandons its corporate duties. *New Albany W. W. v. Louisville*, 122 Fed. Rep. 776.

³⁶ *Southern Illuminating Co.*, 5 Pa. Dist. 781. But see *Brunswick Gaslight Co. v. United, etc., Co.*, 85 Me. 532; 27 Atl. Rep. 525.

authorizing a city to contract with a company for a supply of water, it may agree that such company may assign the contract or sell its plant, and that the assignee or purchaser shall succeed to all the rights of the assignor.³⁷ Where the right of assignment is given, or the assignment is acquiesced in by the city, the assignee must comply with all the terms of the original contract,³⁸ or as modified in the written consent to the assignment.³⁹ If the grant is made to the grantee, his administrator or assigns, his administrator may carry out its provisions after such grantee has died.⁴⁰

³⁷ *American W. W. Co. v. Farmers' Loan and Trust Co.*, 73 Fed. Rep. 956; 20 C. C. A. 133; 36 U. S. App. 563.

³⁸ *Freeport Borough v. Enterprise Natural Gas Co.*, 18 Pa. Super. Ct. 73; *Sandy Lake v. Sandy Lake, etc., Co.*, 16 Pa. Super. Ct. 234; *Austin v. Bartholomew*, 107 Fed. Rep. 349; 46 C. C. A. 327.

³⁹ *In re Pryor*, 55 Kan. 724; 41 Pac. Rep. 958; 29 L. R. A. 398.

What is not an assignment and not a violation of a statute forbidding it, see *Marlborough Gaslight Co. v. Neal*, 176 Mass. 217; 44 N. E. Rep. 139.

⁴⁰ *Stein v. Bienville Water Supply Co.*, 34 Fed. Rep. 145; affirmed 141 U. S. 67; 11 Sup. Ct. Rep. 892.

The power to make and sell gas does not imply the power to sell or assign the privilege to make and sell gas given by the company's charter. *Chicago Gaslight, etc., Co. v. People's, etc., Co.*, 121 Ill. 530; 13 N. E. Rep. 169.

A franchise granting to a gas company and its assignees the right to furnish gas to the inhabitants of a city for fifty years, cannot be divided by assignment, so as to leave the gas company the right to enjoy equally with the assignees the rights and privileges of the franchise, but the franchise may be enjoyed by

only one party at a time. *Ft. Smith Light, etc., Co. v. Kelly*, 94 Ark. 461; 127 S. W. Rep. 975.

A gas company cannot, without legislative authority, sell its property and franchise in such a way as to take away its power to perform its public duties. *Weld v. Board, etc., Commissioners*, 197 Mass. 556; 84 N. E. Rep. 101; *People v. Union Gas & El. Co.*, 254 Ill. 395; 98 N. E. 768; *Attorney General v. Haverhill Gaslight Co.*, 215 Mass. 394; 101 N. E. 1061.

A corporation whose business is limited by its charter to supplying a city and its inhabitants "with light and motive power generated by electricity, steam, or other artificial means, and to the furnishing and supplying of either said light, power, or heat," has no power to purchase or operate a gas plant. *Covington Gaslight Co. v. Covington (Ky.)*, 58 S. W. Rep. 805; 22 Ky. L. Rep. 796.

The legislature may prohibit a gas company selling its physical properties. *Attorney General v. Haverhill Gaslight Co.*, 215 Mass. 394; 101 N. E. 1061.

Even to a newly equipped company equipped by the holders of the stock and bonds of the old company. *Ibid.*

A lease by a gas company of all

§ 482. Rescission of contract.—Breach.

Under proper circumstances a municipality may rescind its contract with a gas company to take gas from it for municipal purposes. But it must be such a breach as goes to the very substance of the contract.⁴¹ And a suit for that purpose can be brought by it.⁴² But mere inadequacy of the supply of gas is not a sufficient reason for cancelling the contract, unless a proper demand for an increase of the supply has first been made.⁴³ In the case of a contract for water, to be furnished

its physical property for a term of years, the business to be carried on by its lessee was held not *ultra vires*. *Waterbury Gaslight Co. v. Walsh*, 228 Fed. 54.

⁴¹ *Light, Heat, etc., Co. v. Jackson*, 73 Miss. 598; 19 So. Rep. 771.

A gas company contracted with a prospective brick company to furnish free gas for a certain period, and gas at a reduced price for an additional period, on condition that the brick company would construct a plant at a designated point, of such extent and capacity as to regularly and permanently employ not less than twenty-five adult employees, and that if, at any time, the plant should be found operating its plant with less than twenty-five *bona fide* adult employees, the gas company might charge three cents per 1,000 cubic feet for gas used and not be held to furnish it free until the company should have at least the full number of adult employees on its pay roll. The brick company failed to at all times employ the designated number of employees, and this was held not to be ground for rescinding the contract, but merely gave the gas company the right to collect for the gas supplied at the rate specified. *Minnetonka Oil Co. v. Cleveland, etc., Co.*, 27 Okl. 180; 111 Pac. Rep. 326.

Where a city which had granted a franchise to supply artificial gas to it, granted another franchise to a natural gas company and authorized it to make arrangements with the artificial company for the use of the latter's mains, reciting in the authorization that such use should not cause a forfeiture of the artificial company's franchise, and the artificial company in pursuance of such authorization leased its mains to the natural gas company, it was held that the city was estopped to claim a forfeiture of the franchise of the artificial company's franchise on account of the lease, or for antecedent breaches of the franchise obligations. *Newport v. Municipal Light Co.*, 147 Ky. 776; 145 S. W. 1197.

⁴² *Light, Heat, etc., Co. v. Jackson*, *supra*.

⁴³ *United States W. W. Co. v. Du Bois*, 176 Pa. St. 439; 38 W. N. C. 419; 35 Atl. Rep. 251.

If, under the franchise, the duty to supply gas is not absolute, the suspension of the supply will not entitle the municipality to forfeit it. A suspension of business for a year, was also held not a sufficient non-user to justify a forfeiture. In this case gas was not furnished because the company could not furnish it in competition

from certain named springs, mere inadequacy of the supply, occasioned by the fact that the springs did not furnish enough water, was held to be no reason for a cancellation of the contract.⁴⁴ If the quality of the gas is not such as the contract calls for, that is not a sufficient reason for its cancellation, unless the company's attention has been called to it, a demand made for a compliance with the contract in that respect, and a failure made or neglect to comply with the demand; and especially is this true, where the quality of gas complained of has been furnished for a period of years.⁴⁵ Where the gas

with others. *Freedonia v. Freedonia Natural Gas & Light Co.*, 162 App. Div. 924; 146 N. Y. Supp. 1116, Reversing 84 Misc. Rep. 150; 145 N. Y. Supp. 820.

Where a village, after a gas company had ceased to exercise its special franchise, assessed it and received taxes from it, it was held that it thereby admitted its existence, and was estopped from declaring that no such franchise existed; and was also estopped to assert a forfeiture of the franchise for non-user. *Freedonia v. Freedonia Natural Gas Co.*, 162 App. Div. 924; 146 N. Y. Supp. 1116, reversing 84 Misc. Rep. 150; 145 N. Y. Supp. 820.

⁴⁴ *Du Bois v. Du Bois City W. W. Co.*, 176 Pa. St. 430; 38 W. N. C. 417; 35 Atl. Rep. 248; 34 L. R. A. 92.

⁴⁵ *Winfield v. Winfield Water Co.*, 51 Kan. 70; 32 Pac. Rep. 663.

Where a contract required plaintiff, who had exclusive control of natural gas to furnish it at certain pressure, and they refused, when the pressure became less than contracted for, to turn it off at the well until the proper pressure was restored, as requested by the defendant, and permitted inferior gas to flow into the defendant's pipes, the defendant was not liable for the gas

used; that it sold such gas, and received full pay from consumers being immaterial, since it could not avoid receiving the gas. *Wilson v. Rushville M. & G. Co.*, 126 N. Y. S. 830.

A private consumer cannot bring suit to cancel the city's contract with the gas company, for there is no privity of contract between him and the company. *Akron Water Works Co. v. Brownless*, 1 Ohio Dec. 1; 10 Ohio C. C. 620.

The company may buy gas to supply its customers with. *Hamilton v. Hamilton Gaslight Co.*, 11 Ohio Dec. 513.

In a suit to enjoin a gas company from violating its franchise and for an accounting of gas sold, consumers of gas are necessary parties. *Wheeling v. Natural Gas Co.*, 74 W. Va. 372; 82 S. E. 345.

A city lighting contract construed and held, that the determination of the question whether the contract was being carried out in good faith was not for the conclusive determination of the board of public improvements, but was open to general inquiry in a court of justice. *National Surety Co. v. St. Louis*, 200 F. 387; 118 C. C. A. 539.

A city, by recognizing for ten years a gas and electric company's exercise of its franchise as law-

was to be paid at so much a light, burning from sunset to sunrise, to consume a certain number of feet per hour, an inability on the part of the company to furnish the full amount agreed upon, is not a sufficient reason for cancelling the contract, where such inability arises from frost getting into the pipes and clogging them so the gas cannot flow through them in sufficient quantities.⁴⁶ A gas company cannot excuse itself on the ground that another gas company was supplying gas to the city and its inhabitants.^{46*}

§ 483. Quality of gas.

In the early stages of gas production little or nothing was said concerning the quality of gas to be furnished. "Gas

ful, was held estopped to question the company's right to engage in its business in the city. *People v. Union Gas & Electric Co.*, 98 N. E. 768; 254 Ill. 395.

Where certain conditions imposed in a divisible franchise granted to a gas company by a city are invalid, they will merely be disregarded, and will not invalidate the remainder of the franchise. *Wheeling v. Natural Gas Co.*, 74 W. Va. 372; 82 S. E. 345.

A company furnishing, by pipes in the streets, gas for light and heat to the inhabitants of a city, is a quasi public corporation, and may not relieve itself from its duty to exercise its franchise for the benefit of the public, so long as it retains its charter. *Attorney General v. Haverhill Gaslight Co.*, 215 Mass. 394; 101 N. E. 1061.

⁴⁶ *In re Richmond Gas Co.* (1893), 1 Q. B. 56; 62 L. J. Q. B. 172; 67 L. T. 554; 41 W. R. 41; 56 J. P.

Where a city, which had granted a franchise to supply artificial gas to the city and its inhabitants, granted another franchise to a natural gas company, and authorized

the latter company to make arrangements with the artificial gas company for the use of the latter's mains, reciting in the authorization that such use should not cause a forfeiture of the artificial gas franchise, and the artificial gas company, in pursuance of such authorization, leased its mains to the natural gas company, the city was held thereafter estopped to claim a forfeiture of the artificial gas franchise for antecedent breaches of the franchise obligations. *Newport v. Municipal Light Co.*, 147 Ky. 776; 145 S. W. 1107.

In an action by a city to forfeit a gas company's franchise, allegations in the petition that the company had been furnishing gas to persons and corporations outside of the city ever since it acquired its franchise, which provided that no gas should be so furnished, was held to be too vague and indefinite to sustain a forfeiture. *Newport v. Municipal Light Co.*, 145 S. W. 1107; 147 Ky. 776.

^{46*} *Grayson v. Marshall* (Tex. Civ. App.), 145 S. W. 1034.

was gas," and that was all there was of it. But gradually a knowledge of the fact dawned upon the minds of public officials that one gas would produce more light per cubic feet than another kind; and if the charge was the same per cubic foot, more light be obtained for the same price. So in time it became a recognized part of contracts with cities that the gas company must furnish gas of a certain candlepower,—the light of a candle being accepted as the measure. A rather odd phase of an instance of this kind arose in England. By a special act of 1868 a gas company was required to supply gas of such a quality as to produce, from an Argand burner having fifteen holes and a seven-inch chimney and consuming five feet of gas an hour, a light of fourteen candlepower. It was held that the obligation thus imposed on the gas company was fulfilled in 1908 by the supply of gas capable of producing a light of the given candlepower from an Argand burner, complying with the specified conditions, of the best type known, for the time being, though it was not capable of producing light of that candlepower from Argand burners, complying with the specified conditions of the best type known at the date of the special Act of 1868.^{46a}

§ 484. Discontinuing use of gas.

A contract may be so drawn as to permit a change from the use of gas to electricity; and this is frequently done.⁴⁷ So it is not infrequent occurrence to draw it so as to authorize the discontinuance of some of the lights and the establishment

^{46a} *Brentford Gas Co. v. Chiswick Urban Council*, 6 L. G. R. 725; 72 J. P. 378.

A contract by which distributing company agreed to purchase merchantable natural gas, was held to imply conformity to ordinary and reasonable standard of quality, and where gas offered for sale contained only about half as many British thermal units per cubic foot as other gas obtained by the company, it was not merchantable. *Ely v.*

Wichita Natural Gas Co., 99 Kan. 236; 161 Pac. 649.

Refusing to accept gas because not conforming to requirements, liability therefore is not effected by a refusal to sign a writing authorizing the seller to dispose of it elsewhere. *Ely v. Wichita Natural Gas Co.*, 100 Kan. 441; 165 Pac. 284.

⁴⁷ *Gaslight and Coke Co. v. New Albany*, 139 Ind. 660; 39 N. E. Rep. 462.

of others. An instance of this kind is furnished by an Iowa case. There the contract provided a city should take gas for lighting the streets and its public buildings for ten years, but also provided that the city might discontinue the use of gas lamps in the business district after a certain time, less than ten years, and change to electric light; and also that it might discontinue the gas lamps in the other parts of the city temporarily or permanently. It was held that the city had no right to use other means to light the streets outside of the business district than gas; and if it choose to light such streets it must take the gas from the gas company.⁴⁸

§ 485. Changing contract.

A municipality can no more change a lighting contract it has with a company, than can an individual change a contract with such company, unless the company agrees to such a change. Usually such contracts provide for changes, and a proportionate increase or decrease of the amount to be paid according to the changes made. Where the guaranty in a contract was that the 100 lights provided for in such contract would furnish good and sufficient light for a territory equal to that then lighted by gas, it was held that it became inoperative when a portion of the electricity necessary to supply the 100 lights was diverted from the street lights to those in the city's public buildings.⁴⁹

§ 486. Gas furnished not covered by contract.—No contract.

If a gas company furnishes a city gas for lights outside of its contract, then the city is liable for the amount thus supplied, regardless of the contract. "A municipality," said Justice Fields, "cannot avail itself of the property or labor of a party, and then screen itself from responsibility under the plea that it never passed an ordinance on the subject. The law implies a promise to pay in such cases."⁵⁰ If a city receives gas and

⁴⁸ Capitol City Gaslight Co. v. Des Moines, 93 Ia. 547; 61 N. W. Rep. 1066; 48 Am. and Eng. Corp. Cas. 138.

⁴⁹ Brush Electric Light, etc., Co. v. Montgomery, 114 Ala. 433; 21

So. Rep. 960. See Southwest, etc., Co. v. Joplin, 113 Fed. Rep. 817.

⁵⁰ San Francisco Gas Co. v. San Francisco, 9 Cal. 453.

Though the charter of a gas company states that the business and

uses it for lighting its streets, without any contract relative thereto, it will be liable, in an action to recover therefor, for the value of the gas supplied.⁵¹

§ 487. Municipality extending limits after making contract.

Contracts usually provide for new territory added to that of the municipality after it is entered into, or else they are usually of sufficient elasticity to provide for such additional territory. And this is true even where no contract has been made for lighting, but simply the right to occupy the streets with pipes or mains and supply private consumers has been given. In such instances the gas company may occupy the new territory without further contract or grant and collect for gas used in the street lamps.⁵² In the Missouri case was also involved the element of estoppel, because of the fact that the gas com-

operations of the company shall consist in furnishing a certain city with gaslight in pursuance of and according to the terms of a certain ordinance of the city, the company may acquire a new franchise for supplying the city with gas, there being no intention to designate the carrying out of the existing contract as the sole business for which the corporation was organized. *Keith v. Johnson*, 109 Ky. 421; 59 S. W. 487; 22 Ky. Law Rep. 947.

⁵¹ *Harlem Gaslight Co. v. New York City*, 33 N. Y. 309, affirming 3 Robt. 100. In this case it was held that a contract fixing the price to be paid for a particular year is not in its nature an agreement running from year to year, and cannot fix the measure of compensation for subsequent use. See *Conyers v. Kirk*, 78 Ga. 480; 3 S. E. Rep. 442.

Mere delay to pay claim for extra lights furnished is not conclusive against the right of the company to pay for them. *Brush Electric Light, etc., Co. v. Montgomery*, 114

Ala. 433; 21 So. Rep. 960; but if both the city and the company thought the extra lights came under the general contract, then no pay for them up to the date that that is discovered not to be true can be claimed. *Id.*

A city cannot compel a gas company to furnish gas for street lamps supplied and lighted and extinguished by a foreign lighting corporation furnishing the city with lighting equipment, and to accept that corporation's records of the gas consumed, or else install meters or employ inspectors at its own expense. *Public Service Gas Co. v. Newark*, 86 N. J. Ch. 384; 98 Atl. 404.

⁵² *St. Louis Gaslight Co. v. St. Louis*, 46 Mo. 121; *Cincinnati, etc., Co. v. Avondale*, 43 Ohio St. 257; 1 N. E. Rep. 527; *Des Moines v. Des Moines W. W. Co.*, 95 Ia. 348; 64 N. W. Rep. 269; *People v. Deehan*, 153 N. Y. 528; 47 N. E. Rep. 787, reversing 11 App. Div. 175; 42 N. Y. Supp. 1071.

pany had occupied the added territory for a long series of years. In New York it is held that the consent of the city is not confined to the streets existing at the time the consent is given, unless that be the natural reading of the consent.⁵³ And a gas company does not violate its contract with a municipality or its franchise where it delivers gas to a consumer within the city, knowing at the time the consumer will not use it until he has transported it beyond the municipal limits.⁵⁴

⁵³ *People v. Deehan*, 153 N. Y. 528; 47 N. E. Rep. 787, reversing 11 App. Div. 175; 42 N. Y. Supp. 1071. See the English case of *Huddersfield v. Ravensthorpe Urban District Council* (1897), 2 Ch. 121; 66 L. J. Ch. 581; reversing (1897) Ch. 652; 66 L. J. Ch. N. S. 286; 76 L. T. Rep. 377; *Carroll v. Silvercreek Gas, etc., Co.*, 153 App. Div. 630; 139 N. Y. Sup. 161, order affirmed 140 N. Y. Sup. 1112; *Northern Westchester Lighting Co. v. Ossining*, 154 App. Div. 789; 139 N. Y. Sup. 373.

Where a plaintiff corporation, developing a resident district and laying gas mains and pipes with the consent of the county board of revenue, could not as a matter of right maintain them in the streets of defendant town subsequently incorporated, the town might, if necessary to secure gas for all its residents of the same class upon equal terms require the company to remove its gas pipes. *Cloverdale Homes v. Cloverdale*, 182 Ala. 419; 62 So. 712.

⁵⁴ *Lawrence v. Methuen*, 166 Mass. 206; 44 N. E. Rep. 247.

Under a Pennsylvania statute giving an exclusive franchise to a gas company, if the city limits be extended another company will not be given a franchise for the new territory. *In re Levis Water Co.*, 11 Pa. Ct. Rep. 178.

In this State a corporation was organized to supply a village with water. It accepted the provisions of the Pennsylvania constitution and the Act of April 29, 1874, and its supplements and amendments after the repeal of the exclusive privileges given to water companies by Sec. 34, clause 3, of that Act, by the Act of June 2, 1887. It was held that it could not obtain an exclusive right or privilege to supply water to the village. *Centre Hall Water Co. v. Centre Hall*, 186 Pa. St. 74; 40 Atl. Rep. 153.

A grant to lay pipes in the streets of a city and in "any additions thereto" covers an unplatted addition to the city. *Seattle Lighting Co. v. Seattle*, 54 Wash. 9; 102 Pac. Rep. 767.

A right to lay pipes in the streets was granted by the "town of Millville and its vicinity." At the time the village of Millville was situated within the town of Millville. It was held that the words "town of Millville and its vicinity" referred to the village of Millville and its vicinity, and not to the township of Millville. *McCarter v. Millville Gaslight Co.*, 73 N. J. Eq. 739; 69 Atl. Rep. 248.

Where plaintiff corporation, developing a residence district and laying gas mains and pipes with the consent of the county board of revenue, could not as a matter of

§ 488. Municipality receiving light under a void contract.

If the contract between a municipality and a lighting company is void because of a lack of power on the part of the former to bind itself by the kind of a contract in which it attempted to do so, yet that will not permit the municipality to wholly escape liability to reimburse the company for the light actually furnished. Such an instance is where the municipality has attempted to give the company the right to occupy its streets, to the exclusion of all other companies. In such an instance the validity of the contract in the feature alluded to is no defense in an action to recover for the light furnished.⁵⁵ So where a city agreed to exempt a gas company from city taxation, and to pay it with money out of its sinking fund, this was held to be no defense in an action for the price agreed upon, for in that respect the city could bind itself, and the *ultra vires* provisions did not invalidate the entire contract.⁵⁶ The fact that the contract was let without due advertisement for bids is also no defense in an action to collect rents.⁵⁶ If the ordinance be void under which the gas or water is furnished, the city cannot arbitrarily pass an ordinance fixing the rates at any rate it chooses.⁵⁷

right maintain them in the streets of defendant town subsequently incorporated, the town might, if necessary to secure gas for all its residents of the same class upon equal terms, upon payment of just compensation, condemn them to the use of the town. *Cloverdale Homes v. Town of Cloverdale*, 182 Ala. 419; 62 So. 712.

⁵⁵ *Illinois Trust, etc., Bank v. Arkansas City*, 76 Fed. Rep. 271; 22 C. C. A. 171; 34 L. R. A. 18; *Gosport v. Pritchard*, 156 Ind. 400; 59 N. E. Rep. 1134; *Higgins v. San Diego*, 118 Cal. 524; 45 Pac. Rep. 824; 50 Pac. Rep. 670; *Sandy Lake v. Sandy Lake, etc., Gas Co.*, 16 Pa. Super Ct. 234.

⁵⁶ *Nebraska City v. Nebraska City, etc., Co.*, 9 Neb. 339; 2 N. W. Rep. 870.

⁵⁶ *Nicholasville Water Co. v. Nicholasville (Ky.)*, 18 Ky. L. Rep. 592; 36 S. W. Rep. 549; 38 S. W. Rep. 430.

⁵⁷ *Des Moines v. Des Moines W. W. Co.*, 95 Ia. 348; 64 N. W. Rep. 269.

Where the ordinance was void, the price fixed in it was held not to control, but the company could recover what the gas was worth, not being limited by the amount named in the ordinance. *Elmira Gaslight Co. v. Elmira*, 2 Alb. L. Jr. 392. But the fact that that part of the grant giving an exclusive grant is void, does not disturb the price fixed upon in the contract. *East St. Louis v. East St. Louis Gaslight and Coke Co.*, 98 Ill. 415.

§ 489. Contracts void for uncertainty.

Occasionally contracts for municipal lighting are so uncertain as to be void. An illustration of this kind arose in Indiana. A city agreed with a gas company to take gas for a period of twenty-three years, and in the contract it was provided that if, at any time during the period of the contract, the city determined to substitute electric for gas lights the gas company should "make the substitution of such electric lights instead of as many street lamps as may be agreed upon between the city and the company, the price at which said electric lights shall be furnished to be fixed by an equitable agreement between the city and the company." It was held that this contract was so uncertain that it was void, no agreement ever having been made as to what or how many gas lamps were to be removed or what should be the price of the electric lights; and so the court refused to enjoin the city from procuring electric lights by competitive bids.⁵⁸ Where the contract was to be paid, after a specified time, the "average price paid by other cities" having efficient works, and in case of a disagreement the amount should be settled by arbitration, it was held to be so impracticable, unreasonable, and indefinite that it could not be enforced.⁵⁹

§ 490. Moonlight schedule.

It is a very common part of municipality lighting contracts that no charge shall be made for light on nights when the moon furnishes a certain amount of light; and usually they give the municipality the power to furnish a schedule of the nights, or parts of nights, upon which gas is not to be furnished. These arrangements generally prevail more frequently in the smaller than in the larger cities. Where such a schedule was in force,

In *Grand Island Gas Co. v. West*, 28 Neb. 852; 45 N. W. Rep. 242, it was held that the amount could not exceed the price named in the void ordinance.

⁵⁸ *Gaslight and Coke Co. v. New*

Albany, 139 Ind. 660; 39 N. E. Rep. 462.

⁵⁹ *Des Moines v. Des Moines W. W. Co.*, 95 Ia. 348; 64 N. W. Rep. 269.

and it was also provided in a proviso that the city should not be liable for rent for any lamps for any night when lamps were not lighted, it was held that full force and effect must be given to the entire contract, so as to include the proviso, and that the city was not liable for the rent of lamps on moonlight nights, when the lamps were not lighted.⁶⁰

§ 491. The price to be paid.

Elsewhere has been discussed the price to be paid for gas as fixed by ordinance; and it is not necessary to again refer to the cases there cited. The municipality has the right to agree to the price to be paid by it for gas; and it is not a sufficient charge of fraud to annul such contract merely to allege that the price agreed upon was higher than private consumers paid. "The price to be paid for gas was within the discretion of the board of trustees of the town," said the Supreme Court of Indiana. "The only allegation concerning fraud is that the price for which appellee is about to contract is three times what is paid by private consumers; and for that reason the proposed contract is fraudulent. There is no allegation that the gas plant may not have to be enlarged to furnish the gas provided for in the contract; or that the plant is of sufficient capacity to furnish gas to light the town, or that any person or company will furnish the gas for less per year or per thousand feet, or that the gas to be furnished to the town under the proposed contract, is not the same quality as that furnished to private consumers, or that the board of town trustees or any one or more of them were about to enter into this contract from any improper or corrupt motives or influence."⁶²

§ 492. Free light.

Often the grant of a company to occupy the streets contains an agreement that the grantor shall have a certain amount of light free of charge, in consideration of the grant. Such

⁶⁰ Winfield v. Winfield Gas Co.,
37 Kan. 24; 14 Pac. Rep. 499.

⁶² Seward v. Liberty, 142 Ind.
551; 42 N. E. Rep. 39.

agreements are valid, and binding even upon the assignee; and this is true even though the original resolution was not properly signed by the officers of the municipality, if the lighting company has built its works, and occupied the streets under it; and especially so is this true if it has furnished free light for several years.⁶³ But, in the same State, where a water company that had the right, under a statute, to enter upon the streets, it was held by another court that a municipal permit was unreasonable if granted on the condition that the company should supply the municipality with water and twenty-five water plugs free of charge for all time.⁶⁴ Where the contract with a natural gas company was to furnish the village gas free of charge "for all street lamps," it was held that the kind of lamps intended must be determined by the common use of the word where natural gas was used for street lighting; and as at the time the contract was executed open lights only were used, it was further held that the gas company could not require the village to use enclosed lights in order to reduce the amount of gas used.⁶⁵ In the charter of a gas corporation incorporated for a certain city was a clause requiring the company to furnish gas sufficient to supply five burners for the public streets for the first year, ten for the second, and so on, and were to complete all necessary works for the manufacture of gas by June 1, 1864. The company sued the city to recover the value of gas furnished it between the years 1864 and 1866, and it was held that the charter did not intend that the gas company should receive a compensation for the gas it was required to supply, the law did not raise an implied promise to pay for it, and that after the time appointed for the completion of the works the company should be allowed a reasonable time for the laying of gas pipes in order to supply

⁶³ *Sandy Lake v. Sandy Lake, etc., Gas Co.*, 16 Pa. Super. Ct. 234.

⁶⁴ *Forty Fort v. Forty Fort Water Co.*, 9 Kulp (Pa.) 241.

⁶⁵ *Saltsburg Gas Co. v. Saltsburg*, 138 Pa. St. 250; 27 W. N. C. 120; 20 Atl. Rep. 844; 10 L. R. A. 193.

the city, and the first year named in the contract should begin after such reasonable time had elapsed.⁶⁶

§ 493. Exemption from taxation in fixing price of gas.

While a municipality has no power to exempt a gas company from taxation, yet it may agree to pay it so much per lamp, and such an additional sum per lamp as will be equal to the taxes paid by the company. Such a method of determining the price to be paid is not an exemption from taxation.⁶⁷ A statute may be enacted requiring a gas company to pay a reasonable fee for the inspection of its gas mains by the city; and where a city provides a fee by ordinance of a certain amount, as so much a mile, another statute may authorize a court to determine whether such fee is reasonable, and if found unreasonable, reduce it.^{67a}

§ 494. Cost of light, out of what fund paid.

It is often a serious question with a municipality heavily in debt whether such debts or the expense of lighting shall be first paid, or whether the money intended for the light can be seized for prior debts. An expense for light or water is regarded as a "current expense," payable out of "current revenues." "It

⁶⁶ *Virginia City Gas Co. v. Virginia City*, 3 Nev. 320.

In a gas company's action against a city for gas furnished a municipal hospital, the hospital was held to be a "city property department," entitled, under the company's franchise, to be furnished gas free of cost. *Philadelphia Co. v. Pittsburgh*, 93 Atl. 614; 247 Pa. 542.

A light and heat company cannot excuse itself from complying with a condition imposed by the ordinance granting the franchise that it furnish free gas to the churches of the borough, because of any invalidity in the ordinance granting the franchise or of any change of conditions since the original grant. *Bellevue Borough v. Manufacturers' Light & Heat Co.*, 85 Atl. 187; 238 Pa. 388.

If two companies consolidate, one of which was to furnish a certain amount of free gas, the consolidated company will be bound also to furnish it. *Charity Hospital v.*

New Orleans Gaslight Co., 40 La. Ann. 382; 4 So. Rep. 433. See *Punxsutawney Borough v. T. W. Phillips Gas & Oil Co.*, 238 Pa. 23; 85 Atl. 1003.

In one case a succeeding company was held bound to furnish free gas, even though the contract was illegal, where its predecessor for 29 years had furnished it. *Vernon Tp. v. United Natural Gas Co.*, 256 Pa. 435; 100 Atl. 1007. While in another the succeeding company was held not bound to furnish free gas to city buildings subsequently constructed which could not be classified with those in existence when the contract for use of the streets was entered into. *Pittsburgh v. Equitable Gas Co.*, 256 Pa. 492; 100 Atl. 1049.

⁶⁷ *Carterville Improvement, etc., Co. v. Carterville*, 89 Ga. 683; 16 S. E. Rep. 25.

^{67a} *In re Pennsylvania Gas Co.*, 101 Atl. 996.

is the items of expense essential to the maintenance of corporate existence, such as light, water, labor and the like, that constitute current expenses payable out of current revenues. The authorities agree that current revenues may be applied to such purposes even though the effect be to postpone judgment creditors.⁶⁸

§ 495. Appropriation for light, when necessary to validity of contract.

In some States an appropriation must first be made before a contract for lighting can be entered into by a municipality. Whenever this is the case, a contract for lighting before such appropriation is made is void. This was held to be the case where the following statute was in force: "No executive department, officers or employee thereof shall have power to bind such city by any contract or agreement, or in any way, to any extent beyond the amount of money at the time already appropriated by ordinance for the purpose of such department, and all contracts and agreements, express or implied, and all obligations of any and every sort beyond such existing appropriations, are declared to be absolutely void." The contract declared void under this statute was one for street lights for five years, at a certain price per light per year, payable monthly.⁶⁹ Similar results have been arrived at in other States.⁷⁰

⁶⁸ Valparaiso v. Gardner, 97 Ind. 1; 49 Am. Rep. 416; Coy v. City Council, 17 Ia. 1; Coffin v. Davenport, 26 Ia. 515; Scott v. Davenport, 34 Ia. 208; Seward v. Liberty, 142 Ind. 551; 42 N. E. Rep. 39; Foland v. Frankton, 142 Ind. 546; 41 N. E. Rep. 1031; Fowler v. F. C. Austin Mfg. Co., 5 Ind. App. 489; 32 N. E. Rep. 596; Laycock v. Baton Rouge, 35 La. Ann. 475. See Atlantic City W. W. Co. v. Reed, 50 N. J. L. 665; 15 Atl. Rep. 10.

⁶⁹ Indianapolis v. Wann, 144 Ind. 175; 42 N. E. Rep. 901; Atlantic City W. W. Co. v. Reed, 50 N. J. L. 663; 15 Atl. Rep. 10.

⁷⁰ Kiichli v. Minnesota, etc., Co., 58 Minn. 418; 59 N. W. Rep. 1088; Garrison v. Chicago, 7 Biss. 480; Superior v. Norton, 63 Fed. Rep. 357; Bladen v. Philadelphia, 60 Pa. St. 464; Philadelphia v. Flanigen, 47 Pa. St. 21; Jonas v. Cincinnati, 18 Ohio 318; Wallas v. San Jose, 29 Cal. 180; San Francisco Gas Co. v. Brickwedel, 62 Cal. 641; Niles W. Co. v. Niles, 59 Mich. 311; 26 N. W. Rep. 525; Atlantic City W. W. Co. v. Reed, 50 N. J. L. 663; 15 Atl. Rep. 10; Pullman v. Mayor, 49 Barb. 57. *Contra*, Leadville, etc., Co. v. Leadville, 9 Colo. App. 400; 49 Pac. Rep. 268.

§ 496. Exhaustion of appropriation as a defense.

In a suit to recover for gas furnished, it is no defense in the city to set up that the appropriation for that purpose had been exhausted, and that the debt had been incurred in excess of the amount appropriated.⁷¹

§ 497. Tax to pay for gas or to support gas plant.

The furnishing of light for the streets and the public places of a city or town is such a work of public character as will authorize the levying of a tax for that purpose.⁷² But gas or water rents established by a municipality where it furnishes the gas or water are not taxes which may be collected by the tax collector, as other taxes are collected.⁷³ Power to levy taxes for gas or water purposes is subject to the limitation of a general statute providing that the aggregate of a municipal tax shall not exceed a certain fixed limit.⁷⁴ Usually a city may pay out of its general fund any deficiency for gas furnished, after it has exhausted its special levy for that purpose.⁷⁵

⁷¹ *New York Mutual Gaslight Co. v. New York City*, 49 How. Pr. 227. As to necessity for an appropriation under a statute, see *Atlantic City W. W. Co. v. Reed*, 50 N. J. L. 663; 15 Atl. Rep. 10; *Taylor v. Lambertville*, 43 N. J. Eq. 107; 10 Atl. Rep. 809, and *Kiechli v. Minnesota Brush Light Co.*, 58 Minn. 418; 59 N. W. Rep. 1088.

⁷² *Bronx Gas, etc., Co. v. New York City*, 17 N. Y. Misc. 433; 41 N. Y. Supp. 358; *Fellows v. Walker*, 39 Fed. Rep. 651 (a case of natural gas).

⁷³ *Dixon v. Entriken*, 6 Pa. Dist. Rep. 447; 19 Pa. Co. Ct. 414.

⁷⁴ *People v. Lake Erie, etc., R. R. Co.*, 167 Ill. 283; 47 N. E. Rep. 518.

The fact that a city had levied for several years a tax in excess of the maximum limit to pay for gas furnished it under a contract will not justify its conduct in refusing to levy the legal amount for such purposes for a subsequent year. *State v. Kearney*, 49 Neb. 337; 70 N. W. Rep. 255; 49 Neb. 325; 68 N. W. Rep. 533.

⁷⁵ *Creston W. W. Co. v. Creston*, 101 Ia. 687; 70 N. W. Rep. 739.

§ 498. Assessing cost of public lighting upon abutting property.—Cost of municipal plant.

Not infrequently the cost of public lighting is assessed upon private property abutting upon the territory benefited, just as the cost of improving the roadway of a street is assessed.⁷⁶ And so the cost of building a gas or water plant is often assessed upon the private property abutting upon the gas or water mains or plant; and this is considered a perfectly legitimate method of providing both for the cost of the light or of the construction of the plant. Where an Act of Congress authorized the commissioners of the District of Columbia to lay water mains whenever and wherever they deemed them necessary for public safety, comfort or health, and assess the cost upon the abutting property, notice to the property owner was deemed not necessary to support the water main tax.⁷⁷ So where a statute empowered a city to construct and establish gas works, or to regulate a private establishment, and to provide by ordinance what part of the expense of lighting the street should be paid by the owners of lots fronting thereon, and in what manner the cost should be assessed and collected; and according to another section, upon petition of a certain number of lot owners within a given distance fronting on a street for lighting such streets according to the city's general plan of improvements such city might cause such part of the street to be lighted, the cost of which should be estimated according to the length of the street lighted, per running foot; it was held that the abutting property was liable, under a proper ordinance, not only for the general gas plant by the city, but for the street fixtures, such as pipes and lamp-posts, the assessment being according to the running foot and not according to the assessed value.⁷⁸

⁷⁶ *People v. Lake Erie, etc., Co.*, 167 Ill. 283; 47 N. E. Rep. 518.

⁷⁷ *Parsons v. District of Colum-*

bia, 170 U. S. 45; 18 Sup. Ct. Rep. 521.

⁷⁸ *Nelson v. La Portē*, 33 Ind. 258.

§ 499. Mandamus to compel auditing or payment of bills.

If a city has a board of audit or of supervisors charged by law with the duty of auditing bills, mandamus lies to compel such board to pass upon a bill for gas furnished, but the court does not necessarily require the board to allow the account. In allowing or rejecting the bill it has a discretion either to allow or reject it, and the court cannot in this respect control their action, though it may compel it to pass upon the bill.⁷⁹ But where an auditing board is not provided for, the company may sue direct for the amount due, and is not compelled to resort to a writ of mandamus.⁸⁰

§ 500. Action to recover for gas supplied.

Under a contract or ordinance to supply gas at a certain price, the gas company may recover from a city for all the gas it has furnished under the contract, in an action based on the contract or ordinance.⁸¹ In such an action, bills for gas furnished during the months immediately preceding the months sued for under the same contract, and approved by the city council, were held admissible to show the number of lamps lighted, and that the city recognized the validity of the contract under which it was furnished, and its liability to pay for it.⁸² It is no defense that the gas works have become a nuisance, especially where no steps to have them declared a nuisance have been taken; and the city must pay for the gas it has received.⁸³ The company has a right to sue for the gas furnished, and is not compelled to resort to a writ of mandamus to compel the city to carry out the

⁷⁹ *People v. San Francisco*, 11 Cal. 42. See *Richmond County Gaslight Co. v. Middletown*, 59 N. Y. 228; 1 Hun 433.

⁸⁰ *Gosport v. Pritchard*, 156 Ind. 400; 59 N. E. Rep. 1058.

⁸¹ *London Gaslight Co. v. Vestry*

of Chelsea, 8 C. B. (N. S.) 215; 9 Gas J. 292.

⁸² *Davenport Gaslight Co. v. Davenport*, 13 Ia. 229.

⁸³ *Davenport Gaslight Co. v. Davenport*, *supra*.

contract; even though the gas was to be paid with by the issuance of city warrants that did not fall due for several months after they were to be issued.⁸⁴

§ 501. Interest.

A gas company is entitled to recover interest on its bills past due; such bills coming within the general interest laws of the State.⁸⁵

§ 502. Lamps.—Posts.

Where the word "lamps" is used in a contract to light a city with natural gas, the contract contemplates such lamps as are commonly used in the natural gas region; and where only open lamps were used in a region where the gas was to be furnished, it was held that the city could not be compelled to use closed lamps, in order to lessen the consumption of gas.⁸⁶ The word "public posts" used in a contract for a supply of gas to the city, includes posts used and erected for the benefit of the public, as well as those actually owned by the city.⁸⁷ Posts put up by the company to light the streets belong to it; and it may maintain an action of trespass for an injury to them. But if the injury, in case it is charged to have occurred by negligence, is occasioned by the bad condition of the street,

⁸⁴ Gosport v. Pritchard, 156 Ind. 400; 59 N. E. Rep. 1058.

If the proper municipal authority has passed upon and allowed the bill, its action is final so far as the city is concerned. Metropolitan Gaslight Co. v. Mayor, 4 N. Y. Weekly Dig. 82.

In a suit for the price of gas furnished under a contract, the record of the city engineer and register of the gas inspector was held to be competent evidence. St. Louis Gaslight Co. v. St. Louis, 86 Mo. 495.

By requiring the gas company in its franchise to erect lamps if directed by the city, does not obligate the city to receive street lighting service. Grayson v. Marshall (Tex. Civ. App.), 145 S. W. 1034.

⁸⁵ Neosho City Water Co. v. Neosho, 136 Mo. 498; 38 S. W. Rep. 89.

⁸⁶ Saltsburg Gas Co. v. Saltsburg, 138 Pa. St. 250; 20 Atl. Rep. 844; 10 L. R. A. 193.

⁸⁷ Davenport Gaslight and Coke Co. v. Davenport, 13 Ia. 229.

without fault of the defendant, then the defendant is not liable; for the relation between the city and the company is such that whatever would have been a good defense against the city, in case the post belonged to it, would be a good defense against the gas company.⁸⁸ Where it would require the laying of one mile of mains to put up six lamp-posts the city was demanding the court refused to compel the company to set them up, although a statute required the company to maintain lamp-posts "in such places or positions as shall be required from time to time by the local board for the purpose of lighting in a proper and effectual manner any street."⁸⁹ Upon the expiration of its contract with a city to furnish it light, the gas company must remove its lamp-posts from the streets—the right conferred on it, even by its charter, to lay mains in the streets not implying that erecting lamp-posts on the streets and retaining them there indefinitely if it ceases to furnish gas and its contract with the city has expired.⁹⁰

⁸⁸ *Roche v. Milwaukee Gaslight Co.*, 5 Wis. 55. See *Crystal Palace Gas Co. v. Idris*, 82 L. T. 200; 64 J. P. 452.

⁸⁹ *Worksop v. Worksop Gas Co.*, 22 Gas. J. 96.

⁹⁰ *New Orleans Gaslight Co. v. Hart*, 40 La. Ann. 474; 4 So. Rep. 215.

Carelessly damaging lamp post, liability. *Ashton v. Eccles Corporation*, 71 J. P. 55.

A corporation having a contract to furnish light to a city has no right to forcibly detach and remove burners used by the gas company, and attached to its pipes encased in the city's lamp posts, and to *replace them with its own lamps*, but should have accomplished its purpose in a legal manner, either by contract with the gas company, or by enforcement of the city's right to gas on reasonable terms.

Public Service Corp. v. American Lighting Co., 67 N. J. Eq. 122; 57 A. 482.

A city franchise obligating the gas company to install lamps if directed by the city does not obligate the city to take street lighting service from the company. *Grayson v. Marshall* (Tex. Civ. App.), 145 S. W. 1034.

Where a borough is required at the instance and for the benefit of a gas company obligated to furnish free gas to install on street lamps gas-saving burners which are more expensive to maintain than those approved by a prior decree, the additional cost of maintenance is chargeable against the gas company. *Manufacturers' Natural Gas Co. v. Birmingham & Brownsville Macadamized Turnpike Road Co.*, 90 Atl. 134; 243 Pa. 458.

§ 503. United States revenue tax.

In Missouri it was held that a gas company was authorized to charge against a city consuming gas the tax imposed by the United States upon illuminating gas;⁹¹ but where a company had contracted to furnish a municipality with gas "free of charge," it was held that it could not recover the amount of the tax imposed under the Internal Revenue Act; even though the Act authorized the company to add such tax to the contract price of gas which had been previously contracted.⁹²

§ 504. Waiver as to quality of gas or light.

There is no doubt that a city may waive its right to defend, when sued for gas supplied it, on the ground that the quality of the gas was not up to contract, the same as it may waive its right to defend when sued for water furnished it, on the ground that the water was impure. Thus a usage of the water for a year without objection was held to be a waiver of the right to defend on the ground that it was impure.⁹³ And even though the city does object, yet accepts the water furnished as a substantial compliance with the contract, under the honest belief that such acceptance is for the best interest of the city, it cannot set up as a defense, when sued for the price, that the water was impure.⁹⁴

⁹¹ St. Louis Gaslight Co. v. St. Louis, 86 Mo. 495, affirming 11 Mo. App. 55.

⁹² Pittsburg Gas Co. v. Pittsburg, 101 U. S. 219.

It has been held that the express companies could add to its charge for transportation the amount required to be paid in stamps by the Internal Revenue Act of 1898 upon each article.

When a gas company is prohibited by statute from paying a dividend in excess of a certain rate fixed by a sliding scale dependent on the price charged for gas, it cannot properly pay dividends at the rate thus fixed free from the income tax. In calculating the maximum divi-

dend payable, the income tax thereon must be included. Attorney General v. Ashton Gas Co., 73 L. J. Ch. 673; [1904] 2 Ch. 621; 91 L. T. 673; 53 W. R. 49; 68 J. P. 477; 20 T. L. R. 601; affirmed 75 L. J. Ch. 1; 22 T. L. R. 82; [1906] A. C. 10; 93 L. T. 676; 70 J. P. 19; 13 Mason 35.

⁹³ Lamar Water, etc., Co. v. Lamar, 140 Mo. 145; 39 S. W. Rep. 768.

⁹⁴ Creston W. W. Co. v. Creston, 101 Ia. 687; 70 N. W. Rep. 739, citing Philadelphia v. Hays, 93 Pa. St. 72, and Winfield Water Co. v. Winfield, 51 Kan. 70; 32 Pac. Rep. 663.

§ 505. Extending mains, failure to pay for light.

It is as much the duty of a city or a town to promptly pay the gas company's bills for light as it is that of a private citizen; and if it does not the company is not compelled to extend its mains and erect new gas posts, as it had agreed to do, upon demand of the municipal authorities, to supply gas for lights not then in use.⁹⁵

§ 506. Receiver bound by contract.

A receiver of a company is bound by such company's contract with the municipality for gas, so long as he continues to furnish it; and he is also bound by the rates fixed in it to be charged private consumers.⁹⁶

§ 507. Municipal officer interested in contract.

Statutes frequently, if not universally, forbid municipal officers to have any interest in municipal contracts; and if they have, generally declare such contracts void, either in direct terms or by construction. In a case in Nebraska where the secretary and treasurer of a corporation was also a member of the city council, the contract of the corporation to light the streets of the city was held void; and it was also held that any taxpayer of the city could maintain a suit to have it cancelled; but for light actually furnished under it, the city must pay what it was actually worth, not to exceed the contract price.⁹⁷ And the same result was reached where a majority of the members of the city council were stockholders in a water company supplying the city with water.⁹⁸ The rule in some instances, however, has been relaxed. Thus where a company received its charter direct from the legislature, compelling it to furnish

⁹⁵ *Pensacola Gas Co. v. Pensacola*, 33 Fla. 322; 14 So. Rep. 826.

⁹⁶ *Manhattan Trust Co. v. Dayton*, 59 Fed. Rep. 327; 16 U. S. App. 588; *Manhattan Trust Co. v. Dayton Natural Gas Co.*, 55 Fed. Rep. 181.

A suit by a receiver appointed by a Federal court for rentals due

for hydrants, can be brought in the United States courts. *Keihl v. South Bend*, 44 U. S. App. 687; 22 C. C. A. 618; 76 Fed. Rep. 921; 36 L. R. A. 228.

⁹⁷ *Grand Island Gas Co. v. West*, 28 Neb. 852; 45 N. W. Rep. 242.

⁹⁸ *Milford v. Milford Water Co.*, 124 Pa. 610; 17 Atl. Rep. 185.

light to all customers of a certain city who desired it, it was held that the city must pay for light received under a contract with the company, although the mayor of the city was president of and a stockholder in it. The charter made all contracts with the city void in which a city officer had an interest; but the court considered that this particular contract was not void for the reason that it was one created by the charter and not by the parties to it.⁹⁹ Where a statute forbade a city officer to have an interest in a contract of the city, the taking of stock by its mayor after the contract had been let, in a company that succeeded the company obtaining such contract, and before such succession took place, did not render the contract void.¹⁰⁰ But the holding of a single share of stock by a city councilman in a company applying for a contract, is a violation of such a statute.¹⁰¹

⁹⁹ *Capital Gas Co. v. Young*, 109 Cal. 140; 41 Pac. Rep. 869; 29 L. R. A. 463.

¹⁰⁰ *State v. Great Falls*, 19 Mont. 518; 49 Pac. Rep. 15.

¹⁰¹ *Foster v. Cape May*, 60 N. J. L. 78; 36 Atl. Rep. 1089.

See a case where it was held that gas works were not the "Works" or "Utilities" in which a councilman could not be interested. *Rex ex rel. La. Fleche v. Sheppard*, 24 Ont. L. R. (Can.) 404; 9 A. L. R. 1; 8 W. R. 1020.

CHAPTER XXII.

MONOPOLISTIC GRANTS AND CONTRACTS.

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- § 527. Extension of time for completion of work.—Additional requirements.
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- § 529. Municipality's right to purchase existing works is optional.
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- § 531. Granting privilege to use streets does not require a general ordinance.—General ordinance regulating streets.
- § 532. Contracts for light, length of term.
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§ 508. Division of subject.

The subject of this chapter is divisible into two branches: one, concerning the grant of the use of the streets of a municipality to a gas company wherein it is agreed that it shall have possession of the streets to the exclusion of all other gas or lighting companies, either in perpetuity or for a designated number of years; second, concerning contracts with gas companies for lighting either in perpetuity, or for a long term of

years. This description must constantly be borne in mind, or confusion will arise in examining the cases. Electric lighting cases, water company cases and street railway cases are, of course, cases analogous to those of gas, and can properly be used in this discussion. In discussing the question, it must be borne in mind that in some States constitutional provisions¹ forbid the granting of exclusive privileges to individuals and corporations; and where such provisions do not exist, some of the cases are made to turn upon the fact, that the legislature has not empowered the municipality to grant such exclusive privileges.*¹

§ 509. Legislature may authorize monopolistic grants.

The cases are not uniform upon the power of the legislature to make or authorize the making of monopolistic grants or contracts. One of the leading cases arose in Wisconsin. In that State the legislature granted to a company the exclusive privilege to manufacture and supply gas to the city of Milwaukee and its inhabitants; and this Act was upheld, the court saying: "It is claimed, or rather suggested, that even the legislature could not confer this exclusive right upon the defendant to manufacture and sell gas in the city of Milwaukee. But we are not aware of any constitutional principle which is violated by the legislature granting such an exclusive franchise. It is true that it may create a monopoly, prevent anything like a free and healthy competition in the supply of gas to consumers, and thus operate to the detriment of the public. But suppose this is all conceded; upon what ground can the court say such legislation is unconstitutional? Of course, the whole mat-

¹ *Beinville Water Supply Co. v. Mobile*, 186 U. S. 212; 22 Sup. Ct. Rep. 820, affirming 175 U. S. 109; 20 Sup. Ct. Rep. 40.

*¹ *Gaslight Co. v. South River*, 77 N. J. Ch. 487; 77 Atl. Rep. 473. There are some things that by their construction are necessarily exclusive. Thus a grant to a street railway to occupy a certain street nec-

essarily excludes all other street railways if it is a narrow street, and usually if it is a wide one. A monopolistic grant of that character is not meant by the use of the term as used in this discussion. *Indianapolis, etc., R. R. Co. v. Citizens' Street R. R. Co.*, 127 Ind. 369; 24 N. E. Rep. 1054; 8 L. R. A. 539; 26 N. E. Rep. 893.

ter, under our constitution, is under the control of the legislature, which can take from the defendant this exclusive privilege whenever it sees-fit to do so. The public concern, in having some competition in the supply of gas, is by no means without a remedy. It can appeal to the legislature to withdraw this exclusive right which it has conferred upon the defendant. And it is but fair to assume, that whenever the monopoly becomes oppressive, the legislature will repeal the special privilege it has granted. At all events, it is sufficient to say that the remedy is with the legislature, which has ample authority to do what may be for the best interests of the citizens of Milwaukee."² This decision is made to rest upon the theory that the legislature can revoke that part of the company's charter giving it an exclusive franchise; but this claim has not been upheld by the Supreme Court of the United States, as we shall see in the next section. The case can, therefore, be regarded as one of doubtful authority. In Tennessee, whose constitution forbids the granting of "perpetuities and monopolies," a grant of the exclusive use of the streets of a city is held not to be a monopoly, and so not forbidden.³ So in New Jersey, without any special statute to that effect, a city's contract with a company to supply it with water so long as the company complied with the obligations of the contract, was upheld.⁴ A case arose in Connecticut concerning a water company that is here illustrative of this question. The city of Bridgeport entered into an agreement with a water works company, giving it the exclusive right to lay pipes in its streets so long as it furnished a full supply of fresh water. The assignee of this agreement expended a large sum of money in putting in water works; and this assignee was authorized by a special Act of the legislature to acquire all the right of the assignor, "including the right to the sole and exclusive use of the public streets," etc., "for the purpose of laying pipes therein to con-

² State v. Milwaukee Gaslight Co., 29 Wis. 454; 9 Am. Rep. 598.

³ Memphis v. Memphis Water Co., 5 Heisk. 495. See Broadway, etc.,

Co. v. Hankey, 31 Md. 346, as to a wharf.

⁴ Atlantic City W. W. Co. v. Atlantic City, 48 N. J. L. 378; 6 Atl. Rep. 24.

duct water into and about said city." Thirty years afterward the legislature gave another company the right to lay pipes and supply water to the same city; and it was held, conceding that the city had no power in the first place to grant an exclusive right, that the legislature having subsequently recognized this claim of power and authorized the assignee to acquire, by assignment, such exclusive right, and the assignee having accepted the provisions of the statute and performed what was required of it, there was a contract existing between it and the city which the legislature could not revoke or impair so long as the assignee supplied the city with abundance of pure water; and that the second grant was an impairment of that contract. It was so held, although a provision in the first charter reserved to the legislature the power to recall the franchise at its pleasure, which, it was said, did not authorize the legislature to impair the contract which the city had entered into for the exclusive use of its streets so long as it should supply the city with water.⁵ Some other cases uphold the power of the legislature to create gas or water companies, and endow them with monopolistic franchises, or to authorize municipalities to make such grants.⁶

⁵ *Citizens' Water Co. v. Bridgeport, etc., Co.*, 55 Conn. 1; 10 Atl. Rep. 170.

⁶ *Crescent City Gaslight Co. v. New Orleans Gaslight Co.*, 27 La. Ann. 138. (In this Louisiana case it was held that the company entitled to the monopoly might enjoin another company denying its right, on the ground that it was a slander on its title.) *St. Louis v. Gaslight Co.*, 5 Mo. App. 484; *Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. 242; *Des Moines St. R. R. Co. v. Des Moines, etc., Co.*, 73 Ia. 513; 33 N. W. Rep. 610; 35 N. W. 602. (In this Iowa case there was no statute specifically authorizing the company to make the contract.) *Memphis v. Memphis Water Co.*, 5 Heisk. 495; *Bartholomew v. Austin*,

85 Fed. Rep. 359; 52 U. S. App. 512; 29 C. C. A. 568; *Newport v. Newport Light Co.*, 84 Ky. 166; *Louisville v. Wible*, 84 Ky. 290; 1 S. W. Rep. 605; *Des Moines Gas Co. v. Des Moines*, 44 Ia. 505; *Montgomery Gas Co. v. Montgomery*, 87 Ala. 245; 6 So. Rep. 113; 4 L. R. A. 616; *Des Moines St. Ry. Co. v. Des Moines*, 73 Ia. 513; 33 N. W. Rep. 610; 35 N. W. Rep. 602; *Jackson County Horse Ry. Co. v. Interstate Rapid Transit R. R. Co.*, 24 Fed. Rep. 306; *Parkersburg Gas Co. v. Parkersburg*, 30 W. Va. 435; 4 S. E. Rep. 650; *Centre Hall Water Co. v. Centre Hall*, 186 Pa. St. 74; 40 Atl. Rep. 152; *Lancaster Gas and Fuel Co. v. Lancaster Gas Co.*, 17 Pa. Co. Ct. Rep. 453; *In re Light and Fuel Co.*, 17 Pa. Co. Ct.

§ 510. Same continued.—Pennsylvania.

The Pennsylvania Corporation Act of April 29, 1874, gives to water companies the right to introduce into boroughs and cities, wherever they may be located, a sufficient supply of pure water; and when completed, its right in the locality by its works is exclusive, until, during a period of five years, the company has divided among its stockholders a dividend equal to eight per cent upon its capital stock. Then it is made law-

Rep. 113; 4 Pa. Dist. Rep. 668; *In re Lancaster Gas Co.*, 5 Pa. Dist. Rep. 244; *In re Williamsport Gas Co.*, 17 Pa. Co. Ct. Rep. 456; 2 Laek. L. News 112; 5 Pa. Dist. Rep. 251; *In re Pittsburg, etc., Co.*, 16 Pa. Co. Ct. Rep. 433; *Gas and Water Co. v. Dowington*, 175 Pa. St. 341; 38 W. N. C. 376; 34 Atl. Rep. 799; *District of Columbia v. Washington Gaslight Co.*, 20 D. C. 39; *Suburban Electric, etc., Co. v. East Orange (N. J.)*, 41 Atl. Rep. 865; *Freeport W. W. Co. v. Pragen*, 3 Pa. Ct. Rep. 371; *Tyrone Gas and Water Co. v. Tyrone*, 195 Pa. St. 566; 46 Atl. Rep. 134; *Atlantic Water Works Co. v. Atlantic City*, 39 N. J. Eq. 367.

In *Atlantic City Water Works Co. v. Consumers' Water Co.*, 44 N. J. Eq. 427, 15 Atl. Rep. 581, an act giving an exclusive franchise to a water company to supply Atlantic City was held void, for the reason that it was special or private legislation, a kind of legislation forbidden by the State constitution.

A statute of Maine provided that no corporation organized under its provisions should have authority without a special act to make or sell gas in any city or town in which another person or corporation was making or selling gas without the consent of such other person or

corporation. It was held that authority given one person or corporation the right to supply gas was prohibition of the right of another company to supply gas unless by consent or special legislative authority. *Twin Village Water Co. v. Damariscotta Gaslight Co.*, 98 Me. 325; 56 Atl. Rep. 1112.

If a gas company has a lawful monopolistic grant to use the streets of a city, it has such a special interest therein that it may maintain a suit in equity to enjoin another company using them or laying its pipes therein. *Ft. Smith Light & T. Co. v. Kelley*, 94 Ark. 467; 127 S. W. Rep. 975.

Unless the legislature authorizes it, a municipality cannot enter into a contract giving a gas company an exclusive right for a term of years to occupy its streets. *Water, etc., Gas Co. v. Hutchinson*, 144 Fed. Rep. 256. See *Smith v. Avon-on-the-Sea*, 68 N. J. L. 243; 52 Atl. 226.

If a company has the exclusive right to occupy the streets of a city, another company cannot insist that its grant, made subsequent to the first one, is valid because the first company has not exercised its rights. *Twin Village Water Co. v. Damariscotta Gaslight Co.*, 98 Me. 325; 56 Atl. Rep. 1112.

ful, after twenty years from the introduction of the water, for the municipality to become the owner of the water works, by paying the net cost of erecting and maintaining the same, with interest thereon at the rate of ten per cent per annum, deducting from the interest the dividends theretofore declared. An Act of May 23, 1874, passed at the same session of the legislature as the previous Act, provided that cities of the third class, should have power in their corporate capacity, to "supply with water the city and such persons, partnerships and corporations therein as may desire the same, at such price as may be agreed upon and for that purpose have at all times the unrestricted right to make and erect all proper works, machinery, buildings, cisterns, reservoirs, pipes and conduits for the raising, reception, conveyance and distribution of water, or to make contracts with, and authorizing any person, company or association to erect all proper water works, machinery, buildings, cisterns, reservoirs, pipes and conduits for the raising, reception, conveyance and distribution of water, and give such persons, company or association the exclusive privilege of furnishing water as aforesaid for any length of time not exceeding ten years." It was held that there was such a repugnancy between the two Acts that both systems of water works could not be in operation at the same time; and if the city had first authorized a private company to put in water works it could not, within the ten years' period build water works for itself. It was considered, in effect, that there was only one thing to be granted, namely, the right to supply the city with water, and when that was granted the power was exhausted for the city to make a grant, as it were, to itself, or rather assume the right to erect and maintain water works, when it had already granted away that right. If the city desired to supply its citizens with water, it must purchase the company's works.⁷ Several rulings of the

⁷ *White v. Meadville*, 177 Pa. St. 108; 27 Pitts. L. J. (N. S.) 102; 35 643; 27 Pitts. L. J. (N. S.) 97; 39 Atl. Rep. 1134 (overruling *Lehigh W. N. C.* 102; 35 Atl. Rep. 695; *Water Co.'s Appeal*, 102 Pa. St. 34 L. R. A. 567; *Metzger v. Beaver Falls*, 178 Pa. St. 1; 39 W. N. C. 515); *In re Millvale Borough*, 162 Pa. St. 374; 29 Atl. Rep. 641, 644;

executive department of that State have been made concerning this statute in the granting of franchises. Thus the exclusive franchise expires when the company has for five years declared a dividend equal to eight per cent upon its capital stock, although the earnings have been largely applied to betterments for which the stock dividends have been issued, until the original capital has been doubled.⁸ The exclusive franchise only embraces the territory described in the application for it, and can-

benefit not only of the company claiming the privileges, but of the two other companies owned by the same persons and doing a much more extensive business, under circumstances which made it much more advantageous and easy for such company to fail to divide 8 per cent per annum for an indefinite period. *Consolidated Gas Co. v. Mitchell*, 1 Dauph. Co. Rep. 71. For other cases, see *People's Natural Gas Co. v. Pittsburgh*, 1 Penn. C. C. Rep. 311; *Appeal of Meadville Fuel Gas Co. (Pa.)*, 4 Atl. Rep. 733, reversing 1 Penn. C. C. Rep. 448; *Lancaster Gaslight and Fuel Co. v. Lancaster Gas Co.*, 17 Pa. Co. Ct. Rep. 453; *In re Light and Fuel Co.*, 17 Pa. Co. Ct. Rep. 113; 4 Pa. Dist. Rep. 668; *In re Charter Lancaster Gas Co.*, 5 Pa. Dist. Rep. 244; *In re Williamsport Gas Co.*, 17 Pa. Co. Ct. Rep. 456; 2 Lack. L. News 112; 5 Pa. Dist. Rep. 251; *In re Pittsburg Illuminating Gas Co.*, 16 Pa. Co. Ct. 433; *In re Levis Water Co.*, 11 Pa. Co. Ct. Rep. 178; *Rienker v. Lancaster*, 14 Lanc. L. Rev. 393; *Centre Hall Water Co. v. Centre Hall*, 186 Pa. St. 74; 40 Atl. Rep. 153; *Carlisle Gas and Water Co. v. Carlisle Water Co.*, 182 Pa. St. 17; 37 Atl. Rep. 821.

⁸ *Citizens' Water Co.'s Charter*, 6 Pa. Dist. Rep. 80.

Wilson v. Rochester, 180 Pa. St. 509; 38 Atl. Rep. 136.

Where the controversy was between two rival companies for the same territory, an act repealing the clause giving an exclusive franchise was upheld. *Luzerne Water Co. v. Toby Creek Water Co.*, 148 Pa. St. 568; 24 Atl. Rep. 117.

The exclusive territorial franchise acquired by a gas company under the Pennsylvania Act of April 29, 1874, was not repealed by the Act of June 24, 1895, of that State. *Southern Illuminating Co.*, 5 Pa. Dist. Rep. 781. *Contra*, *Consolidated Gas Co. v. Mitchell*, 1 Dauph. Co. Rep. 71. An exclusive franchise may be sold to another company. *Southern Illuminating Co.*, 5 Pa. Dist. Rep. 781.

Under the Pennsylvania Act of June 2, 1887, an exclusive franchise can be granted to a gas company only when incorporated for the manufacture of gas for light alone. *Charters of Gas Companies*, 5 Pa. Dist. Rep. 396; 18 Pa. Co. Ct. Rep. 136. *Contra*, *in re Philadelphia Gas Works Co.*, 1 Dauph. Co. Rep. 55.

This statute was held to not apply where, from the nature of the case, an exclusive right cannot in fact be obtained, and the only effect would be to prevent competition throughout a large city for the

not include "the districts adjacent" to a city, although embraced in the application. The exclusive franchise must be for the city (or a certain named portion of it) in which the company applies for a franchise, and it can embrace no more territory than is occupied by a single city, nor can "elastic territory" be embraced in the grant. A case of doubt as to an exclusive franchise should be resolved against the corporation.⁹ The executive department holds that the consent of a corporation already in existence and having an exclusive franchise cannot authorize the granting of the same franchise to another corporation in the same district.¹⁰ When application is made for a franchise covering a territory covered by a previous franchise, it must be shown that the company first granted a franchise has never perfected it.¹¹

§ 511. Same continued.

A statute gave a gas company the exclusive right to supply a certain city with gas for twenty years, giving to the city the right to purchase the gas works in either twenty or twenty-five years, viz., in 1860 or 1865, under certain conditions, with promise that if the city did not purchase at either of these dates the charter should continue in force until 1890. In 1846 the city agreed to give up its right to purchase the works in 1860, the company agreeing, without the consent of its stockholders, that if the city should not buy in 1865 it might do so in 1870, or at the end of any five years thereafter. In 1860 the city desired to purchase the works, but the company declined because of the contract of 1846. In 1870 the city again took steps to purchase, but the company resisted it, now alleging that the contract of 1846 was void, and therefore the time fixed

⁹ *New Castle Water Co. v. West New Castle Water Co.*, 6 Pa. Dist. Rep. 10; 18 Pa. Co. Ct. 498; *New Gaslight Co.*, 7 Pa. Dist. Rep. 151; 1 Dauph. Co. Rep. 22.

¹⁰ *In re Philadelphia Gas Works Co.*, 1 Dauph. Co. Rep. 55.

¹¹ *South Side Gas Co. v. Southern Illuminating Co.*, 18 Pa. Co. Ct. 529; *Southern Illuminating Co.*, 5 Pa. Dist. Rep. 781.

See generally, *Centre Hall Water Co. v. Centre Hall*, 186 Pa. St. 74; 40 Atl. Rep. 153.

by the charter had expired. In 1873 another contract was entered into by both the city and the company and a second gas company, by which it was agreed that the contract of 1846 should be cancelled, all pending litigation dismissed, and the first company should release its exclusive right in a certain portion of the city, besides other provisions immaterial here. It was held that the right conferred upon the city to purchase the works was simply a privilege to become a purchaser in 1860 and 1865, laying the city under no obligation to do so at either of these times; that the gas company was estopped to set up the contract of 1846 as *ultra vires*; and that the contract of 1873 was not *ultra vires* on the part of the company as an attempt on its part to absolve itself from the performance of a corporate duty, that of furnishing gas to a portion of the city, for the right to exclude competition was solely for the benefit of the company, and therefore one it might surrender.¹²

§ 512. Curtailling territory occupied by gas company.

Where a gas company is granted the right to furnish gas through a municipality, neither the latter nor the legislature can thereafter restrict it to less territory than that occupied by such municipality; and any attempt to do so may be successfully resisted, especially after the gas company has entered upon the erection of gas works adequate to supply the entire territory. Such an arbitrary interference with property rights is protected by the Federal Constitution and it cannot be justified as an exercise of the police power.^{12a}

¹² St. Louis v. St. Louis Gaslight Co., 70 Mo. 69, reversing 5 Mo. App. 484.

Under the original contract it was held with reference to this same company that if the area of the city was enlarged, the exclusive grant followed into the new area. St. Louis Gaslight Co. v. St. Louis, 46 Mo. 121.

^{12a} Dobbins v. City of Los Angeles, 25 S. Ct. 18; 195 U. S. 223; 49 L. Ed. 169, reversing judgment (1903), 72 P. 970; 139 Cal. 179; 96 Am. St. Rep. 95; Daly v. Elton, 25 S. Ct. 22; 195 U. S. 242; 49 L. Ed. 177, reversing judgment *In re* Daly (1903), 72 P. 1097; 139 Cal. 216.

§ 513. Statute authorizing exclusive grant.

In Connecticut a statute authorized in direct terms a gas company to lay its pipes in the streets of a certain town, to the exclusion of all other gas companies. No duty of supplying the public with gas was imposed. This statute was held void, and so was an ordinance of the same tenor. The court referred to those instances where the crown granted franchises to build bridges or maintain ferries and collect tolls for their use, and said that unless the grants required the grantees to serve the public, they were void for lack of consideration, and then said: "It is the duty as well as the prerogative of the government to provide necessary and convenient roads and bridges; and, to enable it to accomplish this object, it has everywhere what is called 'the right of eminent domain'; the right over individual estates to resume them for this and other public purposes. Such a prerogative connected with a corresponding duty, with the power to execute it by the exercise of the right of eminent domain, necessarily implies that it belongs to the government to determine what improvements are of sufficient importance to justify the exercise of the right, and when and how it shall be exercised; and if a particular bridge or ferry is considered sufficient for a particular locality, it may stipulate that within such reasonable limits the particular bridge or ferry tolls shall not be diminished by any other improvements of the sort. But it is no part of the duty of the government to provide the community with lights in their dwellings any more than it is to provide them with the dwellings themselves or any part of the necessities or luxuries which may be deemed important to the comfort or convenience of the community. And if it be assured that there could be no impropriety in the lighting of the streets under the control and directions of the sovereign power, this would be merely as a regulation of public power or an incident to the duty to provide safe and convenient ways. And in case the power to provide for lighting the streets is of no importance, because nothing was done to secure the object, unless the plaintiff chose to assume it; and whether they would do so, would probably depend upon whether it could be made profitable.

As, then, no consideration whatever, either of a public or private character, was reserved for the grant; and as the business for manufacturing and selling gas is an ordinary business, like the manufacture of leather or any other article of trade, in respect to which the government has no exclusive prerogative, we think that so far as the restriction of other persons than the plaintiff from using the streets for the purpose of distributing gas by means of pipes can fairly be view as intended to operate as a restriction upon its free manufacture and sale, it comes directly within the definition and description of a monopoly; and although we have no direct constitutional provision against a monopoly, yet the whole theory of a free government is opposed to such grant, and it does not require even the aid which may be derived from the Bill of Rights, which declares 'that no men or set of men are entitled to exclusive public emoluments or privileges from the community,' to render them void. . . . While, then, we are not called upon to question the power and authority of the legislature to grant to the plaintiff the right to lay down their own pipes for the distribution of gas through the streets for their own private purposes, we think, considering that the streets, subject to the public easement, are private property, that it does not possess the power to exclude others from using them for similar purposes."¹³

§ 514. A grant to use of streets to exclusion of all others must rest on statutory power.

In Indiana a statute gave towns absolute control over its streets. A subsequent statute provided that a town should have the "power to provide by ordinance reasonable regulations for the safe supply, distribution and consumption of natural gas within" its limits, "and to require persons or companies to whom the privilege of using the streets and alleys . . . is granted for the supply and distribution of such gas to pay reasonable license for such franchise and privilege." The trustees of a town of that State granted a natural

¹³ *Norwich Gaslight Co. v. Norwich City Gas Co.*, 25 Conn. 19.

gas company the exclusive privilege of laying pipes and mains in the streets and alleys of their town for the purpose of supplying it and its inhabitants with natural gas; and in consideration of this grant the company agreed to furnish natural gas to each alternate street lamp free, and also to furnish gas for lights in front of the church buildings of the town without charge. The grantee of these privileges accepted them and laid its pipes and mains in the street. Thereafter another gas company, without any permit from the town, on the assumption that the grant was void, entered upon its streets and began digging trenches therein and laying pipes. The town brought an action to enjoin them, on the theory that the grant given the first company excluded all other companies. The court held that without permission of the town board of trustees the second company could not lay its pipes in the streets, and for that reason alone it should be enjoined; and that it was not precluded by its illegal grant to the first company. The court also held that inasmuch as the legislature had not empowered the town to grant an exclusive franchise, or one excluding all other companies than the grantee — it had no power to make such a grant. But the discussion of the question ran farther than this. “A municipal corporation,” said the court, “cannot grant to any fuel or gas supply company a monopoly of its streets. There is nothing in the nature of the business of such a company making its use of the streets necessarily exclusive. The spirit and policy of the law forbid municipal corporations from creating monopolies, by favoring one corporation to the exclusion of others. It is probably true that a municipal corporation may make a contract with a gas company for supplying light to the public lamps for a limited time, even though it be for a number of years; on this point, however, there is some conflict, but there is no conflict on the proposition that, in the absence of express legislative authority, a municipal corporation cannot grant to any corporation the exclusive privilege of using its streets. There is, we know, much conflict among the authorities upon the question of the power of the legislature to grant an exclusive right to a gas company to use the highways of a municipal

corporation; and, under our constitution, it is very doubtful whether the legislature possesses such authority. But we are not here concerned with that phase of the question, since the legislature has not attempted to vest an exclusive privilege in any corporation."¹⁴ Some of the courts, however, go very far in upholding grants of this kind, under the general statute

¹⁴ *Citizens' Gas, etc., Co. v. Elwood*, 114 Ind. 332; 16 S. E. Rep. 624; 20 Am. and Eng. Corp. Cas. 263; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1; 19 Sup. Ct. Rep. 77; *Indpls. Cable St. R. R. Co. v. Citizens' Street R. R. Co.*, 127 Ind. 369; 24 N. E. Rep. 1054; 26 N. E. Rep. 893; 8 L. R. A. 539; *Crowder v. Sullivan*, 128 Ind. 486; 28 N. E. Rep. 94; 13 L. R. A. 647; *Rushville v. Rushville Natural Gas Co.*, 132 Ind. 575; 28 N. E. Rep. 853; 15 L. R. A. 321; 43 Am. and Eng. Corp. Cas. 483; *Westfield Gas, etc., Co. v. Mendenhall*, 142 Ind. 538; 41 N. E. Rep. 1033; *State v. St. Louis*, 145 Mo. 551; 46 S. W. Rep. 981; *State v. Cincinnati Gas-light and Coke Co.*, 18 Ohio St. 262; *Saginaw Gaslight Co. v. Saginaw*, 28 Fed. Rep. 529; 16 Am. and Eng. Corp. Cas. 562; *Garrison v. Chicago*, 7 Biss. 480; *Jackson County Horse Co. v. Inter-State, etc., Co.*, 24 Fed. Rep. 306; *Atchison Street Ry. Co. v. Missouri Pacific Ry. Co.*, 31 Kan. 600; 3 Pac. Rep. 284; *Davis v. Mayor*, 14 N. Y. 506; 67 Am. Dec. 186; *Illinois, etc., Co. v. St. Louis*, 2 Dill. 70; *Memphis Gayoso Gas Co. v. Williamson*, 9 Heisk. 314; *Hamilton v. Hamilton Gas-light and Coke Co.*, 11 Ohio Dec. 513; *Parkersburg Gas Co. v. Parkersburg*, 30 W. Va. 435; 4 S. E. Rep. 650; *Capital City, etc., Co. v. Talahassee*, 42 Fla. 462; 28 So. Rep. 810; *Kirkwood v. Mera-mee Highlands Co.*, 94 Mo. App. 637; 68 S. W. Rep. 761; *Water, L. & G. Co. v. Hutchinson*, 144 Fed. Rep. 256.

The following are some instances of grants of exclusive franchises or monopolistic contracts or grants: *Logan v. Pyne*, 43 Iowa 524; 22 Am. Rep. 261 (an omnibus line, not upheld); *Gale v. Kalamazoo*, 23 Mich. 344; 9 Am. Rep. 80 (a market house, void); *Montjoy v. Pillow*, 64 Miss. 705; 2 So. Rep. 108; *Louisville v. Wible*, 84 Ky. 290; 1 S. W. Rep. 605 (removing the dead animals of a city, five years' contract sustained); *Chicago v. Rumpff*, 45 Ill. 90; 92 Am. Dec. 196 (slaughtering animals for city's use, void); *Le Claire v. Davenport*, 13 Ia. 210 (a market, sustained), overruling *Davenport v. Kelly*, 7 Ia. 102; *St. Louis v. Jackson*, 25 Mo. 37 (sale of meat in a market house, sustained); *Bloomington v. Wahl*, 46 Ill. 489 (sale of meat, not sustained); *Iler v. Ross*, 64 Neb. 710; 90 N. W. Rep. 869 (right to collect ashes, void). See *St. Louis v. Weber*, 44 Mo. 547; *Bowling Green v. Carson*, 10 Bush. 64; *Buffalo v. Webster*, 10 Wend. 100; *Bush v. Seabury*, 8 Johns. 418; *Tugman v. Chicago*, 78 Ill. 405; *Bethune v. Hughes*, 28 Ga. 560; *Caldwell v. Alton*, 33 Ill. 417 (sale of vegetables during certain hours of the day, not sustained); *Smith v. Westerly*, 19 R. I. 437; 35 Atl. Rep. 526; *Westerly W. W. Co. v. Westerly*, 80 Fed. Rep. 611; *Westerly W. W. Co. v. Westerly*, 75 Fed. Rep. 181; 76 Fed. Rep. 467.

giving power to a city over its streets and to light them, or secure a company to furnish light for that purpose, and to its inhabitants. It has been held in a number of well considered cases that a municipality had the power to grant an exclusive franchise.¹⁵ In a leading New York case a statute authorized a city to enter into a contract for lighting its streets, but did not specify the length of time it was to run; and it was held that it did not confer power to make an absolute and binding contract for a term of years; and that the statute could be repealed while a contract yet had several years to run. It was considered that the city could revoke the contract at any time it saw fit.¹⁶

§ 515. Grant of exclusive franchise strictly construed.

Courts do not look with favor upon grants to give exclusive rights to occupy the streets and furnish lights to the municipality's inhabitants. Such a grant is strictly construed, in fact, it may be said very strictly construed. Thus an exclusive right to furnish gas light will not confer a right to furnish light by electricity without the consent of the city.¹⁷ And the mere fact that a gas company has the right to lay its pipes in the streets,

¹⁵ *Des Moines St. Ry. Co. v. Des Moines*, 73 Ia. 513; 33 N. W. Rep. 610; 35 N. W. Rep. 602; *Newport v. Newport Light Co.*, 84 Ky. 166; *Fergus Falls Water Co. v. Fergus Falls*, 65 Fed. Rep. 586; *Illinois Trust and Savings Bank v. Arkansas City*, 76 Fed. Rep. 271; 22 C. C. A. 171; 34 L. R. A. 518.

¹⁶ *Richmond County Gaslight Co. v. Middletown*, 59 N. Y. 228, affirming 1 T. and C. 143.

Power not expressly given, will not be presumed, unless necessarily or fairly implied or incident to other powers expressly given — not simply convenient, but indispensable to them. *Los Angeles v. Los Angeles City W. Co.*, 177 U. S. 558; 20 Sup. Ct. Rep. 736; *Detroit Citizens' St. Ry. Co. v. Detroit Ry.*, 171 U. S. 48; 18 Sup. Ct. Rep. 732; affirming 110 Mich. 384; 68 N. W. Rep. 304; *Park Com'rs v. Common Council*, 28 Mich. 228.

"State legislatures may not only exercise their sovereignty directly, but may delegate such portions of it to inferior legislative bodies as,

in their judgment, is desirable for local purposes." *Walla Walla v. Walla Walla W. Co.*, 172 U. S. 1; 19 Sup. Ct. Rep. 77.

A lease giving the exclusive right to cross lands with pipe lines is void, because against public policy; and the lessee is not entitled to compensation for the invasion of his exclusive right in condemnation proceedings by another of a similar right of way across the same lands; nor is the lessor entitled to compensation for loss of rent because of the abandonment by the holder of the exclusive right of the lease under which such right is claimed. *Calor Oil & Gas Co. v. Franzell*, 128 Ky. 715; 109 S. W. Rep. 328; 33 Ky. L. Rep. 98.

¹⁷ *Newport v. Newport Light Co.*, 89 Ky. 454; 11 Ky. L. Rep. 840; 12 S. W. Rep. 1040; *Saginaw Gaslight Co. v. Saginaw*, 28 Fed. Rep. 529; *Parkersburg Gas Co. v. Parkersburg*, 30 W. Va. 435; 4 S. E. Rep. 650; *Helena v. Helena W. W. Co.*, 122 Fed. Rep. 1.

the city agreeing to take a certain amount of gas from it for a certain time, from lamps placed on the street by the company, does not give it exclusive right.¹⁸ Nor does a statute give a gas company an exclusive franchise merely because it requires the company to furnish the city gas within three years, and authorizes it to make and sell gas for fifty years.¹⁹ An exclusive franchise to operate a street horse railway does not prevent the municipality granting a franchise to an electric railway company.²⁰ Where a company secured the exclusive right to supply a city with water from a certain creek, which was the most accessible source for the city's water supply, it was held that this did not prevent the city granting to another company the right to supply the city with water taken from some other source.²¹ So where the charter of a company authorized it to take water from a certain pond with water for domestic purposes, and forbade those who had mill privileges on the pond to cut below the pipes of the company or interfere with the water or obstruct the works; it was held that this did not give the company the exclusive right to the water of the pond for the purposes designated; and the legislature could grant to another company the right to take water from such pond.²² In New Jersey, however, a different rule of interpretation was allowed to prevail in one case. A gas company was authorized to lay its pipes, with the consent of the abutting property owners, in a certain city. It did so, and then another company proceeded to do so without any legislative authority whatever. The first company sought and obtained an injunction against the second; and it was held "that the grant of a franchise by the State is, by its own extensive force, and without express words, exclusive against all persons but the State, and that any attempt to exer-

¹⁸ *Vincennes v. Citizens' Gaslight and Coke Co.*, 132 Ind. 114; 31 N. E. Rep. 573; 16 L. R. A. 485.

¹⁹ *Memphis Gayoso Gas Co. v. Williamson*, 9 Heisk. 314. See also *Sheffield United Gas Co. v. Sheffield Consumers' Co.*, 2 Gas J. 360.

²⁰ *Omaha Horse Ry. Co. v. Cable Tramway Co.*, 30 Fed. Rep. 324.

See *Des Moines St. Ry. Co. v. Des Moines, etc., Ry. Co.*, 73 Ia. 513; 33 N. W. Rep. 610; 35 N. W. Rep. 602.

²¹ *Stein v. Bienville Water Supply Co.*, 34 Fed. Rep. 145; affirmed 141 U. S. 67; 11 Sup. Ct. Rep. 892.

²² *Rockland Water Co. v. Camden, etc., Water Co.*, 80 Me. 544; 15 Atl. Rep. 785.

cise like rights and privileges without legislative authority is a fraud and unwarranted usurpation of power.”²³ In Pennsylvania it was held that a charter “for supplying light and heat by means of natural gas” in a certain city did not conflict with the charter of another company for “the manufacture and supply of gas for fuel heat,” at the same place, both grants being exclusive.²⁴ So a grant to supply “heat to the public from gas” was held not to conflict with another grant for the same territory “for the purpose of supplying heat to the public by means of natural gas conveyed from such adjoining counties as may be convenient.”²⁵ In the absence of words giving an exclusive franchise, a contract between a municipality and a company for gas cannot be construed as such a franchise.²⁵ A vote of the town authorizing the town council to give a town the right to lay pipes in the streets, followed by the town’s silence for five years without taking action relative to the purchase of the plant (which it had a right to make), of the use of the water by the town for its own hall and drinking fountains where a certain quantity of water was to have been furnished as a condition of the grant of the use of the streets — nor a vote of the town to purchase the company’s works — does not give an exclusive franchise to the company.²⁶ The courts will not adopt such a construction of a statute incorporating a water company as will prevent the State or a municipality from ever after

²³ *Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. 242.

²⁴ *Erie Mining and Natural Gas Co. v. Gas Fuel Co.*, 15 W. N. C. 399. See *Emerson v. Commonwealth*, 108 Pa. St. 111; *Carother’s Appeal*, 118 Pa. St. 468; 12 Atl. Rep. 314; 11 Cent. Rep. 48; *Johnston v. People’s, etc., Gas Co. (Pa.)*, 5 Cent. Rep. 564; *Sterling’s Appeal*, 111 Pa. St. 35; 2 Atl. Rep. 105; 2 Cent. Rep. 49; *Wilkes-Barre Light Co. v. Wilkes-Barre, etc., Co.*, 4 Kulp 47; *In re Johnston (Cal.)*, 69 Pac. Rep. 973.

²⁵ *Emerson v. Commonwealth*, 108

Pa. St. 111; 15 W. N. C. 425; 42 Leg. Int. 81.

²⁵ *Bartholomew v. Austin*, 85 Fed. Rep. 359; 52 U. S. App. 512; 29 C. C. A. 568; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685; 17 Sup. Ct. Rep. 718, *Skaneateles W. W. Co. v. Skaneateles*, 161 N. Y. 154; 55 N. E. Rep. 562; affirming 33 N. Y. App. Div. 642; 54 N. Y. Supp. 1115.

²⁶ *Westerly W. W. Co. v. Westerly*, 80 Fed. Rep. 611. See *Westerly W. W. Co. v. Westerly*, 75 Fed. Rep. 181; 76 Fed. Rep. 467; *Smith v. Westerly*, 19 R. I. 437; 35 Atl. Rep. 526.

using the waters of a stream it has appropriated to its use, for public or municipal purposes, without making compensation to such company, unless the legislative intent is beyond doubt.²⁷ Several cases arose in New Orleans over the attempted annulment by constitutional provisions of exclusive franchises previously granted; and these provisions were held to be void by the Supreme Court of the United States. In one of these cases an ordinance of the city gave the lessee of a hotel a right to supply the hotel with water drawn from the Mississippi river many blocks away through mains laid in the streets, and this was held to impair an exclusive franchise previously granted to a water company to supply the city and its inhabitants with water, although there was a clause in such franchise reserving to the city power to grant to any person who was "contiguous to the river, the privilege of laying pipes to the river, exclusively for his own benefit." It was said that no lot could be contiguous unless it actually fronted on the river, or was separated

²⁷ *St. Anthony Falls Water Power Co. v. Board*, 168 U. S. 349; 18 Sup. Ct. Rep. 157. See *Syracuse Water Co. v. Syracuse*, 116 N. Y. 167; 22 N. E. Rep. 381; 5 L. R. A. 546; *In re City of Brooklyn*, 143 N. Y. 596; 38 N. E. Rep. 983; 26 L. R. A. 270; *Helena v. Helena W. W. Co.*, 122 Fed. Rep. 1.

As an illustration how strictly contracts for an exclusive right to supply a municipality with gas is construed, see a New York case where it was held that a contract of the board of improvements of a town with a gas company to lay its pipes in its streets did not prevent other officers becoming vested with the power to determine whether leave should be granted to other companies to lay pipes in the streets, nor prevent them exercising the power. *Parfitt v. Ferguson*, 3 N. Y. App. Div. 176; 38 N. Y. Supp. 466; affirmed 159 N. Y. 111; 53 N. E. Rep. 707.

Granting a company the right to occupy all the streets in a city is

not the granting of an exclusive franchise. *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1; 19 Sup. Ct. Rep. 77; 60 Fed. Rep. 957; *Hughes v. Momence*, 163 Ill. 535; 45 N. E. Rep. 300; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685; 17 Sup. Ct. Rep. 718; *In re City of Brooklyn*, 143 N. Y. 596; 38 N. E. Rep. 983; 26 L. R. A. 270.

A special act will not be construed to give a monopoly unless it clearly appears to be so intended. *La Campagne pour L'Eclairage au Gas v. La Campagne, etc.*, 25 Can. S. C. 168; *Atlantic City W. W. Co. v. Consumers' Water Co.*, 44 N. J. Eq. 427; 15 Atl. Rep. 581; *Westerly W. W. Co. v. Westerly*, 80 Fed. Rep. 611; *Helena v. Helena W. W. Co.*, 122 Fed. Rep. 1.

A grant to one company to furnish gas does not prevent a similar grant to another company. *Sapulpa v. Sapulpa Oil & Gas Co.*, 22 Okl. 347; 97 Pac. Rep. 1007.

from the river only by a public highway, with no private owner intervening, or possibly, on a block or square so located.²⁸

²⁸ *New Orleans Water Works v. Rivers*, 115 U. S. 674; 6 Sup. Ct. Rep. 273; *New Orleans W. W. Co. v. Ernst*, 32 Fed. Rep. 5.

The grant of an exclusive franchise does not prevent a city from imposing on a gas company the cost of changes in the location of its pipes and mains under the city streets, necessitated by the construction of municipal drainage. *New Orleans Gaslight Co. v. Drainage Commission*, 197 U. S. 453; 25 Sup. Ct. Rep. 471; 49 L. Ed. 831, affirming 111 La. 838; 35 So. 929.

What is not an exclusive right of way over lands for pipe lines, though the lease of the lands to bore for gas is, see *Brookshire Oil Co. v. Casmolia, etc., Co.*, 156 Cal. 211; 103 Pac. Rep. 927.

A natural gas company incorporated to produce and deal in natural gas for light, heat and other purposes, which has supplied a municipality and its inhabitants with natural gas for light, is not prevented from continuing so to do by the organization of another company under another statute, although the latter company has the exclusive privilege to manufacture gas for light only, as authorized by such latter act. *Hagan v. Fayette Gas-Fuel Co.*, 21 Pa. Co. Ct. Rep. 503; 29 Pittsb. Leg. J. (N. S.) 229. There is no limit to the number of companies a city may authorize to furnish gas within its limits, unless some other company has the exclusive right. *Hagan v. Fayette Gas-Fuel Co.*, *supra*.

Where the charter of a gas company provided that no public street

should be injured without permission of the city first obtained, a license by the city to use the streets was held to vest in the company a perpetual property in the lands constituting the streets, which would not be taken from it only for cause by due process of law. *Attorney General v. Consolidated Gas Co.*, 124 N. Y. App. Div. 401; 108 N. Y. Supp. Rep. 823, affirming 56 N. Y. Misc. Rep. 49; 106 N. Y. Supp. Rep. 407.

The granting of a right to supply gas in a county wherein is a city in which a gas company has the exclusive right to furnish gas does not render the grant void. *Commonwealth v. Consumers' Gas Co.*, 214 Pa. 72; 63 Atl. Rep. 463.

A gas company may be granted an exclusive franchise until it has divided among its stockholders a certain amount of dividends. *Commonwealth v. Consumers' Gas Co.*, *supra*.

A franchise ordinance authorizing a natural gas company to use streets, alleys, and public grounds on condition that gas shall not be sold for lighting purposes in competition with gas manufactured by the city was held not to create a monopoly inhibited by law. *Wheeling v. Natural Gas Co.*, 74 W. Va. 372; 82 S. E. 345.

In this instance the city permitted an electric light plant to compete with it (the city), and let its own plant become dilapidated, it was held that the gas company would not be enjoined from permitting its gas to be used in what would amount to competition with the city, were it selling gas, or be

§ 516. Exclusive grant to a gas company not preventing grant to an individual.

As a fair illustration of the strictness with which the grant of an exclusive franchise is construed, is a case that arose in Maryland. There certain companies were authorized to supply the city of Baltimore and the counties of Baltimore and Anne Arundel counties with gas; and it was provided that no gas company chartered in any other county in the State should have the right to lay mains or sell gas in such two counties, nor should any other gas company within such city and such two counties should be chartered to furnish gas therein. It was held that this statute did not prohibit the granting of a franchise to an individual.^{28a}

§ 517. Consolidation of gas companies.

Statutes not infrequently permit gas companies operating within a municipality under a franchise from a city to consolidate or merge their respective rights and privileges, and thereafter operate as a single company.^{28b} A city in granting a franchise may insert a condition that the company shall not consolidate with any other company; but the granting of a franchise to a subsequent company in which the privilege of consolidation with other companies is inserted estops it to declare a forfeiture where the first company consolidates with the latter.^{28c} In such an instance a majority of the stock-

required to account in damages to the city. *Ibid.*

Reservation in a release of an oil and gas lease covering property platted for a city addition was held not to renew complainant's rights in the tract, on a grant by the village to another company of the right to lay gas mains in the street to supply consumers from an outside source. *Carroll v. Silver Creek Gas & Improvement Co.*, 139 N. Y. S. 161; 153 App. Div. 630, order affirmed 140 N. Y. S. 1112.

^{28a} *Consolidated Gas Co. v. Com-*

missioners, 99 Md. 403; 58 Atl. Rep. 214.

^{28b} *People v. People's Gaslight & Coke Co.*, 205 Ill. 482; 68 N. E. Rep. 950. This case involves whether or not the act under consideration is a special law, and whether or not the title to the act was broad enough to cover its subject matter, and whether or not two subject matters were embraced in its provisions.

^{28c} *Theis v. Spokane Falls Gaslight Co.*, 49 Wash. 477; 95 Pac. Rep. 1074.

holders of one of the companies have the power, in the absence of fraud or unfairness, to exchange its franchise for that of the new corporation; and one of the original companies has implied power to purchase its gas from the other, instead of manufacturing it itself.^{2d}

^{2d} *Theis v. Spokane Falls Gas-light Co., supra.*

A grant of a franchise in consideration of which the gas company agrees to pay the city annually a certain sum and containing a provision that such payments will continue only as long as the company enjoys its franchise without competition, is not contrary to public policy, not tending to destroy competition and create a monopoly. *Richardson Gas & Oil Co. v. Altoona*, 79 Kan. 466; 100 Pac. Rep. 50.

A statute preventing gas companies extending their mains to a municipality already existing is valid and not void on the ground that it tends to create a monopoly. *Millville Imp. Co. v. Pitman, etc., Gas Co.*, 76 N. J. L. 826; 71 Atl. Rep. 1134.

The Massachusetts statute (Rev. Laws, c. 121, §§ 1, 5, 6, 8, 14, 15, 26, 34, 35) creating a board of gas and electric light commissioners, with power to exercise general supervision over gas and electric lighting companies, and with authority to fix the maximum price for gas and electricity, takes control of such companies so far as necessary to prevent the abuse of monopoly. *Weld v. Gas & El. Light Commrs.*, 197 Mass. 556; 84 N. E. Rep. 101.

The charter of a gas company authorized it to furnish gas light to a

city, and did not authorize it to furnish any other light. It had no facilities to furnish any other light. A city granted it the exclusive right to use the streets to furnish gas and "other illuminating light." It was held that the grant as to "other illuminating light" was void. *People's El. Light, etc., Co. v. Capitol Gas, etc., Co.*, 116 Ky. 76; 75 S. W. Rep. 280; 25 Ky. L. Rep. 327.

In Maine, prior to 1895, the legislature reserved the right to determine whether the public good demanded franchises to be granted at all for supplying municipalities with gas or electricity, and whether, when such franchise had been granted in certain towns, to determine if it would be for the public good to permit indiscriminate competition. *Twin Village Water Co. v. Damariscotta Gaslight Co.*, 98 Me. 325; 56 Atl. Rep. 1112.

Validity of New Jersey statute permitting purchasers under judicial sales of the property of a gas company to incorporate for the purpose of supplying gas. *Millville Imp. Co. v. Pitman, etc., Gas Co.*, 76 N. J. L. 826; 71 Atl. Rep. 1134.

A statute authorizing city to furnish gas is not repealed by a later statute authorizing to contract with a gas company for gas. *Smith v. Avon-by-the-Sea*, 68 N. J. L. 243; 52 Atl. Rep. 226.

§ 518. Legislature cannot revoke monopolistic clause of company's charter.

In the previous section, it is said that the legislature had the power to revoke the monopolistic feature of a gas company's charter or franchise, and this is said of a charter where the right to change or revoke that feature was not reserved in the original grant. The Supreme Court of the United States does not take this view of the matter. The Louisiana legislature granted to a gas company the exclusive right, for fifty years, to lay pipes in the streets of New Orleans and furnish gas to the inhabitants of that city. The company laid its pipes in the streets, built its works, and supplied gas for several years. The legislature then granted to another company the right to also lay pipes in the streets and furnish gas; and upon application of the first company, the second company was enjoined, on the theory that the second grant infringed upon the rights of the first company.²⁹ The court was careful to state that the granting of the franchise giving the grantee the exclusive right to furnish gas to the city did not prevent the city adopting proper police regulations for the control of the gas company so far as they related to the health and protection of the inhabitants of the city, and the control of the city's property and streets. Other decisions of this court follow this case.³⁰ The same rule was applied to a gas company created in Kentucky, even though the constitution of that State provided "that all freemen, when they form a social compact, are equal, and that no man or set of men are entitled to exclusive, separate emolu-

²⁹ *New Orleans Gas Co. v. Louisiana Light, etc., Co.*, 115 U. S. 650; 6 Sup. Ct. Rep. 252 (reversing 4 Woods 90); *Cresecent City Gaslight Co. v. New Orleans Gaslight Co.*, 27 La. Ann. 138; *Bridge Proprietors v. Hoboken*, 1 Wall. 116; *Binghamton Bridge*, 3 Wall. 51. *Contra*, *Ham-*

ilton Gaslight and Coke Co. v. Hamilton, 37 Fed. Rep. 832.

³⁰ *New Orleans W. W. Co. v. Rivers*, 115 U. S. 674; 6 Sup. Ct. Rep. 273 (reversing 4 Woods 134); *St. Tammany W. W. v. New Orleans W. W.*, 120 U. S. 64; 7 Sup. Ct. Rep. 405; *New Orleans W. W. Co. v. Ernst*, 32 Fed. Rep. 5.

ments or privileges from the community, but in consideration of public services." In 1838 a charter was granted to a gas company; and in 1856 the legislature provided that thereafter "all charters and grants of and to corporations, or amendments thereof, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein expressed." In 1869 this charter of 1838 was amended, granting to a gas company, in such amendment, an exclusive right to occupy the streets of Louisville. In 1872 another statute was passed authorizing another gas company to lay its pipes, with the consent of the city council, in the streets, and to furnish gas to its inhabitants. This latter Act was held void, because it was clear that the Act of 1869 gave the company the right to continue to enjoy the franchise it then possessed for the term therein named without being subject to have its charter in that respect amended or repealed at the will of the legislature.³¹ In Missouri one of the Appellate Courts drew a distinction between the power of the legislature to authorize a gas company to occupy streets to the exclusion of others, and the power to authorize an exclusive right to vend gas for the same time in a city—holding the former a valid grant, and the latter void, because prohibited both by the common law and by a clause in the constitution prohibiting the granting of special privileges.³²

³¹ *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683; 6 Sup. Ct. Rep. 265; reversing 81 Ky. 263. See *Hovelman v. Kansas City Horse R. Co.*, 79 Mo. 632.

³² *St. Louis Gaslight Co. v. St. Louis, etc., Co.*, 16 Mo. App. 52.

An ordinance for the laying of pipes in certain streets is not invalidated by the fact that pipes of a private company exist on some of the streets. *Hughes v. Momence*, 163 Ill. 535; 45 N. E. Rep. 300.

A State cannot even by a consti-

tutional provision abrogate the exclusive clause in the franchise of a water company; and in such an instance a city cannot insist on furnishing the water under the plea that it will furnish a purer and more suitable supply. *St. Tammany W. W. Co. v. New Orleans W. W. Co.*, 120 U. S. 64; 7 Sup. Ct. Rep. 405; 14 Fed. Rep. 194.

But see *Beinville Water Supply Co. v. Mobile*, 186 U. S. 212; 22 Sup. Ct. Rep. 820; affirming 175 U. S. 109; 20 Sup. Ct. Rep. 40.

§ 519. Municipality agreeing not to compete with gas company.

A municipality may bind itself not to compete with a gas company to which it has granted a right to furnish gas to it and its inhabitants, by agreeing in the grant not to engage in furnishing gas as a municipal enterprise for a named period. But it may well be doubted if it could thus bind itself in perpetuity. Thus in the State of Washington a city was chartered by a special Act of the legislature, and was authorized to issue its bonds, not to exceed fifty thousand dollars in amount, to build water works, or to authorize a company to build them. The city authorized a company to put in a water works system, upon the condition that it would furnish free water for city hydrants and for flushing the sewers; and agreed to not build water works of its own for twenty-five years. It was also provided that if the service of the company should prove unsatisfactory, the city might apply to the courts to secure, for sufficient cause, a revocation of the grant. After the company had constructed its works and for several years had supplied water, without securing a revocation of its grant, it submitted the question, pursuant to a general statute, to the people whether or not it should build water works on its own account; and the vote being favorable to the building of them, enacted an ordinance for their construction, and provided for an issue of one hundred and sixty thousand dollars of bonds for that purpose. The court restrained the city from entering upon the enterprise of building its own water works, holding that so long as the first grant remained unrevoked it could not do so; and that the contract not to engage in a competitive work of supplying water was binding upon the city.³³ The mere grant of a right to build a gas plant, lay pipes in the street, and supply the city and its inhabitants with gas, accompanied by contracts, at different times, for lighting the streets, does not prevent the city, when such contracts are at an end, building its own gas plant and supplying itself and its inhabitants with gas; and that, too, even

³³ *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1; 19 S. Ct. Rep. 77, affirming 60 Fed. Rep. 957.

though the city had several times fixed the price of gas, under a statute, at which it should be sold to the inhabitants of the city.³⁴ And a statute providing that when any existing company refuses to extend its lines, make connections, or perform certain other duties when required to do so by the municipal authorities, its charter should be forfeited, and the city be at liberty to establish and maintain gas works of its own, passed after the company had been granted a franchise, does not impair the obligation of contracts, within the meaning of the Federal Constitution, although the value of the existing company's franchise is diminished by the city's erecting its own works.³⁵ The fact that the city owns its own gas works does not enable it to prevent a gas company, having the right to do so, from extending its mains and supplying gas to the city's inhabitants at a rate below that at which the city can manufacture and supply it, thereby rendering its enterprise a losing one.³⁶ It has been sometimes held that statutes were so peculiar in their terms that a municipality could not engage in the enterprise of furnishing water, where it had granted the right to a private corporation, even though such grant was not an exclusive one. Such is a case already cited.³⁷ In New York a case arose which rests on such a statute — a very peculiar statute. In that State it has been decided that the fact of a municipality granting to a water company the right to furnish the city and its inhabitants water, containing no grant of an exclusive character, did not prevent it from making the same kind of a grant to another water company;³⁸ and that rule is adhered to in the case now

³⁴ *State v. Hamilton*, 47 Ohio St. 52; 23 N. E. Rep. 935; 29 Am. and Eng. Corp. Cas. 208; *Westerly W. Co. v. Westerly*, 80 Fed. Rep. 611; 75 Fed. Rep. 181; 76 Fed. Rep. 467; *Helena v. Helena W. W. Co.*, 122 Fed. Rep. 1.

³⁵ *Hamilton Gaslight and Coke Co. v. Hamilton*, 146 U. S. 258; 13 Sup. Ct. Rep. 90; affirming 37 Fed. Rep. 832; *State v. Hamilton*, 47 Ohio St. 52; 23 N. E. Rep. 935; 29 Am. and Eng. Corp. Cas. 208;

North Springs Water Co. v. Tacoma, 21 Wash. 517; 58 Pac. Rep. 773; 47 L. R. A. 214.

³⁶ *Hamilton v. Hamilton Gaslight Co.*, 11 Ohio Dec. 513.

³⁷ See the case of *White v. Meadville*, *supra*. See *Welsh v. Beaver Falls (Pa.)*, 40 Atl. Rep. 784.

³⁸ *In re City of Brooklyn*, 143 N. Y. 596; 38 N. E. Rep. 983; 26 L. R. A. 270; *Syracuse Water Co. v. Syracuse*, 116 N. Y. 167; 22 N. E. Rep. 381; 5 L. R. A. 546; *Power v.*

under discussion. A village gave a non-exclusive franchise to a water company to construct a water system. After the expiration of the franchise, the village did not purchase the system, as the law provided it might, but began the construction of its own system under a statute which authorized it to levy a tax where the net water receipts were insufficient to pay the indebtedness incurred in building the system when due, and to "establish a scale of water rates for the use of water and also rates for the fire protection to be assessed on all real property abutting on the mains or within two hundred feet of the hydrants, or on such real property so abutting or within said distance as such boards may deem beneficial, upon which real property the water is not used, by the owner or occupant thereof for domestic or manufacturing purposes." After the work of constructing a municipal plant was begun, the existing private water company brought suit to enjoin its construction, claiming that the above section was invalid; and the court sustained its claim. The basis of the decision was that, if the net receipts were not sufficient to pay the debt incurred in putting in the plant, the village had the power to tax the private company's plant and all its consumers of water; but if such consumers would abandon it, and take water from the village "for domestic or manufacturing purposes," then their properties were exempt from the tax. The court regarded this as such an unfair provision that it violated that provision in the Federal Constitution prohibiting a State impairing the obligation of a contract.³⁹

Athens, 99 N. Y. 592; 2 N. E. Rep. 609.

³⁹ Skaneateles Water Works Co. v. Skaneateles, 161 N. Y. 154; 55 N. E. Rep. 562; affirming 33 N. Y. App. Div. 642; 54 N. Y. Supp. 1115. See Warsaw W. W. Co. v. Warsaw, 16 N. Y. App. Div. 502; 44 N. Y. Supp. 876.

The contract of a city not to construct a plant of its own may arise

by implication. Tyrone Gas and Water Co. v. Tyrone, 195 Pa. St. 566; 46 Atl. Rep. 134.

If a gas company has the exclusive right to furnish gas to a city, it may maintain a bill to restrain the city proceeding under its general powers to build a plant. Gas and Water Co. v. Dowington, 175 Pa. St. 341; 38 W. N. C. 376; 34 Atl. Rep. 799. See Southwest Mis-

§ 520. Legislature may not authorize monopolistic grants.

Notwithstanding what has been said in the former sections, there are quite a number of cases which hold that the legislature cannot itself, nor authorize a municipality to, grant an exclusive franchise, nor even enter into a contract with a gas or water company to take gas or water from it for a long period of years and agree to exclude all competitors. Such grants or contracts are held to create such a monopoly as the usual clause in a constitution against monopolies prohibits.⁴⁰ The granting of an exclusive right of way to lay pipes in the streets or highways is void under the Texas constitution.⁴¹

§ 521. Estoppel to contest validity of monopolistic grant.— Ratification.

A municipality is not estopped to deny the validity of a monopolistic contract if it could not make it; for to allow an estoppel would be to bind the corporation by a grant or contract it had no power to make. A city or town being a public

souri Light Co. v. Joplin, 113 Fed. Rep. 817.

A city cannot insist on furnishing water, to the exclusion of a water company, under the plea that it will furnish a purer and more suitable supply. *St. Tammany W. W. Co. v. New Orleans W. W. Co.*, 120 U. S. 64; 7 Sup. Ct. Rep. 405; 14 Fed. Rep. 194.

Under the Connecticut Acts, 1893, p. 386, c. 231, § 13, providing that if a city, deciding to build a lighting plant, thereafter refuses to purchase a private plant operated by a gas company incorporated by the legislature, it may be compelled to do so, and a commission appointed by the court to adjudicate whether the plant should be purchased, and what the price and conditions of the sale should be, the commission has no power to pass on the validity of the statute. *Norwich Gas & El. Co. v. Norwich*, 76 Conn. 565, 57 Atl. Rep. 746.

⁴⁰ *Brenham v. Brenham Water Co.*, 67 Tex. 542; 4 S. W. Rep. 143; *Janeway v. Duluth*, 65 Minn. 292;

68 N. W. Rep. 243. See *Des Moines Gas Co. v. Des Moines*, 44 Iowa 505. In *Bartholomew v. Austin*, 85 Fed. Rep. 359; 52 U. S. App. 512; 29 C. C. A. 568, the United States Court of Appeals disapprove of this case in passing upon the clause in the constitution of Texas against monopolies. *Edwards County v. Jennings*, 89 Tex. 618; 35 S. W. Rep. 1053; 33 S. W. Rep. 585; *Davenport v. Kleinschmidt*, 6 Mont. 502; 13 Pac. Rep. 249; *Minturn v. La Rue*, 23 How. 435 (a ferry right); *Long v. Duluth*, 49 Minn. 280; 51 N. W. Rep. 913; *Atlantic City W. W. Co. v. Consumers' Water Co.*, 44 N. J. Eq. 427; 15 Atl. Rep. 581; diametrically opposed to *Atlantic City W. W. Co. v. Atlantic City*, 48 N. J. L. 378.

⁴¹ *Edwards County v. Jennings*, 89 Tex. 618; 35 S. W. Rep. 1053; affirming 33 S. W. Rep. 585. See *People v. Bowen*, 30 Barb. 24; affirmed 21 N. Y. 517; *Elmira Gas-light Co. v. Elmira*, 2 Ala. L. Jr. 392.

corporation, those who contract with it are as much bound to know its powers and limitations as its inhabitants and officers; so that it cannot be successfully said that those contracting with it were in ignorance of its power to bind itself or were misled by the representations of its officers.⁴² Silence for five years without taking any action to purchase the plant under a contract, as it had a right to do, or by use of the water for town purposes, or a vote of the town to notify the company of an intention to purchase its plant, or all these together will not estop the city so as to prevent it setting up the invalidity.⁴³ So a clause in a company's charter granting it the right to lay its pipes in the streets of a certain town for an indefinite period, but not granting to or recognizing any authority in the town council to make an exclusive grant of a right therein, will not constitute a ratification of an unauthorized exclusive grant made by it.⁴⁴ And the fact that the company has used the streets for twenty years, even under permission of the city council, will not prevent the court from inquiring into its right to an exclusive use of the streets," and the fact that others have not exercised a similar right does not make the company's uses the exercise of a right to exclude others.⁴⁵

§ 522. A federal question.

The granting of a second or other franchise impairing the benefit given by an earlier franchise, or its revocation, raises a question under the Constitution of the United States giving the Federal courts jurisdiction when properly raised.⁴⁶

⁴² *Smith v. Westerly*, 19 R. I. 437; 35 Atl. Rep. 526.

⁴³ *Westerly W. W. Co. v. Westerly*, 80 Fed. Rep. 611. See *Westerly W. W. Co. v. Westerly*, 75 Fed. Rep. 181; 76 Fed. Rep. 467.

⁴⁴ *Smith v. Westerly*, 19 R. I. 437; 35 Atl. Rep. 526.

⁴⁵ *State v. Cincinnati, etc., Co.*, 18 Ohio St. 262; *Cincinnati Gas-light and Coke Co. v. Avondale*, 43 Ohio St. 257; 1 N. E. Rep. 527.

A city dealing with a gas com-

pany for a long time is estopped to set up the invalidity of such company's organization. *Wyandotte Electric Light Co. v. Wyandotte*, 124 Mich. 43; 82 N. W. Rep. 821; *Atlantic City W. W. Co. v. Reed*, 50 N. J. L. 665; 15 Atl. Rep. 10.

⁴⁶ *Walla Walla v. Walla Walla Water Works Co.*, 172 U. S. 1; 19 Sup. Ct. Rep. 77; *Logansport, etc., Gas Co. v. Peru*, 89 Fed. Rep. 185; *Southwestern Missouri Light Co. v. Joplin*, 113 Fed. Rep. 817.

§ 523. Monopolistic clause does not avoid whole contract.

A clause to furnish gas or water in which is an objectionable monopolistic clause will not avoid the whole contract. The agreement to pay for the gas or water remains in force and the city or town entering into the contract is bound thereby.⁴⁷

§ 524. Enjoining passage of ordinance.

A court has no power to enjoin the passage of an ordinance granting to a second company a franchise which is a direct violation of a previous grant made by it, or is in violation of a statute giving such an exclusive franchise. The court will wait until a contest may arise between the claimants under the two franchises or in some other way arising after the ordinance has been enacted.⁴⁸

§ 525. Forfeiture of exclusive franchise.

A gas or water company given an exclusive privilege to supply a city with gas or water will lose such privilege, so far as it is exclusive, unless it complies with the duty imposed upon it to furnish gas or water. It must provide adequate mains for the delivery of gas or water to all parts of the city in sufficient quantities for the wants of the inhabitants; not, however, being compelled to enter those regions where the number of consumers, and where public lights or water are not needed, or will be so few as to make the cost of supplying them out of all proportion to the amount of the income derived from the sale of gas or water.⁴⁹

⁴⁷ Illinois Trust and Savings Bank v. Arkansas City, 76 Fed. Rep. 271; 40 U. S. App. 257; 22 C. C. A. 171; 34 L. R. A. 518; Jackson County Horse Ry. Co. v. Interstate Rapid Transit R. R. Co., 24 Fed. Rep. 306; Levis v. Newton, 75 Fed. Rep. 884.

Under the Texas Constitution, forbidding exclusive privileges in public utilities the grantee of a municipal franchise cannot escape liability on a bond securing commencement of operation of a plant

on account of reinstatement of a franchise granted a competitor. Grayson v. Marshall (Tex. Civ. App.), 145 S. W. 1034.

⁴⁸ Des Moines Gas Co. v. Des Moines, 44 Ia. 505; Montgomery Gaslight Co. v. Montgomery, 87 Ala. 245; 6 So. Rep. 113; 4 L. R. A. 616.

⁴⁹ New Orleans Water Works Co. v. Rivers, 115 U. S. 674; 6 Sup. Ct. Rep. 273; New Orleans W. W. Co. v. Ernst, 32 Fed. Rep. 5.

And before a court will protect it in its exclusive franchise it must show some honest and active efforts to assert and exercise the right claimed by it.⁵⁰

§ 526. Exclusive franchise for artificial gas does not exclude natural gas.

We have an illustration how strictly an exclusive franchise is construed in several natural gas cases. Thus an early statute in a State authorized the giving to a corporation the exclusive right to supply a town with gaslight, and to erect the necessary buildings to manufacture and distribute the gas. It was held that this exclusive franchise did not prevent the town giving to a natural gas company the right to furnish gas, although such company would supply gas for lighting purposes.⁵¹

⁵⁰ Where the public policy of a State, as evidenced by years of legislation, is to permit, with the sanction of the municipal authorities, the freest possible competition in the use of the public streets for the laying of gas pipes, a gas company having such a franchise is not entitled to recover damages against another company, which, with the municipal consent, exercised a similar franchise, because the latter had failed to comply with some statutory requirement, especially where such franchise was exercised for several years, during which the State took no action in the matter. *Cumberland Gaslight Co. v. West Va., etc., Gas Co.*, 182 Fed. 667; affirmed 188 Fed. 585. It will not be permitted to copy the conduct of the "dog in the manger." *Scranton Electric Light and Heat Co. v. Scranton, etc., Co.*, 3 Pa. Co. Ct. Rep. 628.

⁵¹ *Warren Gaslight Co. v. Pennsylvania Gas Co.*, 161 Pa. St. 510; 29 Atl. Rep. 101; *Hagan v. Fayette Gas-Fuel Co.*, 21 Pa. Co. Ct. Rep. 503; 29 Pittsb. Leg. J. (N. S.)

229; *Circleville Light & P. Co. v. Buckeye Gas Co.*, 69 Ohio St. 259; 69 N. E. Rep. 436; *Quimby v. Consumers' Gas Trust Co.*, 140 Fed. Rep. 362; *Columbus v. Columbus Gas Co.*, 76 Ohio St. 309; 81 N. E. Rep. 440; *Cumberland Gas Co. v. West Va., etc., Gas Co.*, 188 Fed. 585, affirming 69 N. E. 436.

A charter to "manufacture and sell calcium carbide and its product, and purposes incident thereto and connected therewith," does not come in conflict with one giving an exclusive franchise for the supply of gaslight. *Lebanon Gas Co. v. Lebanon Fuel, etc., Co.*, 5 Pa. Dist. Rep. 529; 18 Pa. Co. Ct. Rep. 223; *Johnston v. People's, etc., Gas Co. (Pa.)*, 7 Atl. Rep. 167; 5 Cent. Rep. 564.

For analogous cases, see *Malone v. Lancaster, etc., Co.*, 182 Pa. St. 309; 40 W. R. C. 434; 15 Nat. Corp. Rep. 98; 14 Lanc. L. Rev. 321; 37 Atl. Rep. 932; *Wilkes-Barre Light Co. v. Wilkes-Barre, etc., Co. (Pa.)*, 4 Kulp 47; *Emmerson v. Commonwealth*, 108 Pa. St. 111; *Carother's Appeal*, 118 Pa. St. 468; 12 Atl.

§ 527. **Extension of time for completion of work.—Additional requirements.**

If a gas or water company fails to complete the works it has undertaken, in compliance with the requirements imposed upon it by the city, such city may impose additional terms or exact additional requirements in extending the time for the completion of such works.⁵²

§ 528. **Gas works built under void grant or franchise.**

In a number of instances gas and water works have been built under contracts with municipalities extending exclusive rights to furnish gas or water for the city and its inhabitants, sometimes in perpetuity, but usually for a long term of years; and under these grants the companies have gone on at a great expense, built their works, bonded them, and furnished gas or water for several years, before the question of validity of the grant or franchise was raised. Usually the question in such instances is raised in a suit against the municipality to recover pay for gas or water furnished, and then it is quickly settled, the court holding that in such an instance the validity of the grant cannot be litigated.⁵³ But in other instances where the question is properly raised the courts will not hold the contract void until, at least, after a reasonable time has expired after it was made, especially where the municipality's conditions have not changed as to population and assessed valuation, where no better facilities are offered upon more reasonable terms, and where the company would suffer irreparable loss.⁵⁴

Rep. 314; 11 Cent. Rep. 48; Sterling's Appeal, 111 Pa. St. 35; 2 Atl. Rep. 105; 2 Cent. Rep. 49; *In re Johnston*, 137 Cal. 115; 69 Pac. Rep. 973.

⁵² *Eureka Light-Ice Co. v. Eureka*, 5 Kan. App. 669; 48 Pac. Rep. 935.

⁵³ *State v. Great Falls*, 19 Mont. 518; 49 Pac. Rep. 15; *Sandy Lake v. Sandy Lake, etc., Gas Co.*, 16 Pa. Sup. Ct. Rep. 234.

⁵⁴ *Columbus Water Co. v. Colum-*

bus, 48 Kan. 378; 29 Pac. Rep. 762; 15 L. R. A. 354; *Illinois Trust and Savings Bank v. Arkansas City*, 76 Fed. Rep. 271; 40 U. S. App. 257; 22 C. C. A. 171; 34 L. R. A. 518; *Anoka W. W., etc., Co. v. Anoka*, 109 Fed. Rep. 580, bondholder's rights. See *Madison v. Morristown, etc., Co.*, 63 N. J. Ch. 120; 52 Atl. Rep. 158; *Morristown v. East Tennessee, etc., Co.*, 115 Fed. Rep. 304; *Beinville Water Supply Co. v.*

§ 529. Municipality's right to purchase existing works is optional.

Statutes frequently give municipalities the power to purchase from a private company putting in works under contract with them, its plant, and providing machinery to determine the price that shall be paid. Usually in all cases it is entirely optional with the municipalities to purchase these plants.⁵⁵ In such instances the city must exercise its option at the time designated in the contract. If the price to be paid is to be settled by arbitrators to be chosen, one by the city and the other by the company, for instance, the city cannot insist that the company enter into an arbitration before such city has determined to exercise its option and buy the works. If the company refuse to select an arbitrator, the city may insist that it has forfeited its franchise, especially is this true where the grant is illegal because it is an exclusive one.⁵⁶ Where a statute provided that if a municipal corporation after deciding to establish a municipal lighting plant, refuses to purchase a private plant operated under a statute, it might be compelled to do so, and a commission appointed by the court to adjudicate whether the plant should be purchased and what the price and conditions of the sale should be, it was held that the commission had no power to pass on the constitutionality of the statute. This statute provided that the city should purchase the plant at its fair market

Mobile, 186 U. S. 212; 22 Sup. Ct. Rep. 820; affirming 175 U. S. 109; 20 Sup. Ct. Rep. 40.

⁵⁵ Skaneateles Water Works Co. v. Skaneateles, 161 N. Y. 154; 55 N. E. Rep. 562; affirming 33 N. Y. App. Div. 642; 54 N. Y. Supp. 1115; Crescent City Gaslight Co. v. New Orleans Gaslight Co., 27 La. Ann. 138.

⁵⁶ Montgomery Gaslight Co. v.

Montgomery, 87 Ala. 372; 5 So. Rep. 735; 4 L. R. A. 616.

The bringing of a suit for the appointment of commissioners to assess the value of the property to be purchased by the city is sufficient evidence of a disagreement between the company and the city as to the value of such property. Braintree Water Supply Co. v. Braintree, 146 Mass. 482; 16 N. E. Rep. 420.

value, including as an element of value the earning capacity, based on actual earnings, and it was held that in determining the price the commission might properly consider the changes needed for the reasonable improvement of the plant, the amount of the output, the fact that the company had an established business built up at the risk of private capital, and the policy of the State as shown by the statute. This statute also provided that when the city decided to set up a plant, if a company engaged in furnishing gas in the city should elect to sell its plant, the city should purchase it at its fair value less the amount of any encumbrance, but the city might require it to be transferred free from encumbrance, unless the court, through its commission, should determine otherwise. It also provided that the gas company desiring to sell its property should appoint a special commission for the purposes just stated, and their report must be confirmed by the court unless a remonstrance be filed by either party, and if the matter of the remonstrance be found true, the report might be set aside in whole or in part, and another commission be appointed, and like proceedings had until the report of the commissioners covering all the questions should be confirmed; and it authorized equitable process to compel compliance with the final decree. It was held that on confirmation of such a report, adjudging that the city purchase the plant of the petitioner, it was justified in providing that the sale and transfer should take place at the expiration of ninety days from the acceptance of the report, and that it could settle the form of deed and bill of sale to be used, and the manner of their delivery, though none of these details were contained in the report of the commission. It appeared that the plant was encumbered by a mortgage securing long-time bonds, paying interest at a greater rate than that at which the city could have borrowed money. The commission reported that the sale should be made subject to this mortgage, and in confirming

this report the court provided that if the petitioner should in the future pay any part of the mortgage debt it should recover the sum so paid from the city, with interest; and this was held proper; and it was also held proper to order the sale be made subject to such mortgage. In their report the consumers stated that in fixing the price they had considered the "powers and policy of the state," and it was held, on appeal, that in the absence of proof, this statement could not be regarded that the "powers and policy of the State" had been considered as an element of price; that it was proper to value the plant as a whole without specifying the particular considerations leading to the result; that the question of the validity of the bonds could not be considered on remonstrance to the confirmation of the report on the ground that the report was against the weight of the evidence; that the commission having viewed the plant it was not error in the court to refuse to interfere with its decision as to the value of the property; that it was proper for the judgment to fix the fixed amount of purchase money to be paid by computing the exact amount due on a mortgage debt that was to be deducted from the price paid; that it was proper to order the issuance of an execution for the price at the expiration of ninety days, and that the petitioner recover of the city the value of certain supplies and materials connected with the plant, and to be sold with it, of which the mode of valuing had been agreed upon.^{50a}

^{50a} *Norwich Gas & El. Co. v. Norwich*, 76 Conn. 565; 57 Atl. Rep. 746.

A statute authorizing a city to purchase a gas company's plant if they could agree on a price and if they could not agree, then upon a value fixed by appraisers, requires the valuation to be made upon the basis of a "going concern," not only of the value of the physical apparatus by which the company car-

ries on its business, but their powers to use that apparatus for the purpose of carrying it on. *Perth Gas Co. v. Perth Corporation*, 80 L. J. P. C. 168; (1911) A. C. 506; 105 L. T. 266; 27 T. L. R. 526.

An ordinance covering the right of the city to exercise its option to purchase a gas franchise on its expiration is valid. *Gathright v. H. M. Byllesby*, 154 Ky. 106; 157 S. W. 45.

§ 530. Unlawful combinations between gas companies.

Combinations between two gas or lighting companies sometimes assume monopolistic features and are void. Thus an agreement between two companies that neither would furnish gas to the consumers of the other is void, and furnishes a basis for a monopoly; and because of that fact the courts may declare their franchises forfeited.⁵⁷ So much so is a contract of this character void that a person undertaking to secure an agreement between two companies to divide the territory of the city between them, and the one not to compete in the territory assigned to the other, cannot recover for his services.⁵⁸

⁵⁷ *State v. Portland Natural Gas and Oil Co.*, 153 Ind. 483; 53 N. E. Rep. 1089; 53 L. R. A. 413; 74 Am. St. Rep. 314; *Consumers' Oil Co. v. Nunnemaker*, 142 Ind. 560; 41 N. E. Rep. 1048; 51 Am. St. Rep. 193; *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396; 9 Sup. Ct. Rep. 553; *Chicago Gaslight and Coke Co. v. People's Gaslight and Coke Co.*, 121 Ill. 530; 13 N. E. Rep. 169; *Pittsburgh Carbon Co. v. Philadelphia Co.*, 130 Pa. St. 438; 18 Atl. Rep. 732.

⁵⁸ *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396; 9 Sup. Ct. Rep. 553.

A contract between the holder of a 50-year franchise to furnish natural gas to the inhabitants of a city, and a gas corporation owning natural gas wells and a system for distribution in the city, on one side, and a lighting corporation authorized to furnish gas and to buy and sell the same, on the other, which bound the gas company to furnish gas during the life of the franchise to the lighting company for sale to the inhabitants of the city, etc., was in effect a sale of the franchise to the lighting company, and hence was not in violation of the Arkansas anti-trust law of 1905 (Acts 1905, p. 1), prohibiting combinations among competitors. *Ft. Smith Light & Traction Co. v. Kelley*, 94 Ark. 461; 127 S. W. 975.

Such a contract at best was only in partial restraint of trade, and therefore not void. *Ibid.* Such a contract is for the benefit of the lighting company, and it was entitled under its contract to avail itself of that privilege by contracting with

others to furnish cheaper gas, without making such contract cover the same period of time covered by the contract with the gas company.

A contract between the holder of a franchise to furnish natural gas to the inhabitants of a city and a gas corporation owning natural gas wells and a system for distribution in the city, and a lighting corporation, authorized to furnish gas for domestic uses in the city and to buy and sell gas, bound the gas company to furnish natural gas to the lighting company, to be sold by it in the city, and stipulated that both parties would "promote and protect the interests of each other, and above those of any other person or corporation," and that the lighting company might purchase natural gas from others furnishing the same at lower figures, provided the lighting company should, before making any contract therefor, give to the gas corporation an opportunity to meet such prices, etc. Held, that the quoted provision merely referred to the mutual protection of the parties in matters where their common interests conflicted with that of a third person, and did not prohibit each party from promoting his own interest when it conflicted with that of the adverse party, and that the lighting company did not violate the contract by organizing a competing corporation in the production and sale of gas, and bringing it into the field to compete with the gas company so as to obtain from such competing corporation gas at lower prices not met by the gas company. *Ibid.*

§ 531. Granting privilege to use streets does not require a general ordinance—general ordinance regulating streets.

A municipal authority, however, whether it is forbidden or not empowered to give an exclusive grant to a gas company to use its streets, may practically achieve the same end, by granting to a special company the right to use its streets, and refraining from granting it to others. Such action of the municipality is not void, nor does it violate any clause of a constitution or statute forbidding the granting of special privileges. Speaking of an ordinance of this character, the Supreme Court of Indiana said: "It does, it is true, grant a right to use the streets of the town, but it does not exclude their use by competing companies. It does not throttle competition, for it merely grants a license to use the streets. It cannot be held that permission to one company to use the streets excludes others; on the contrary, the grant of such a license leaves plenary power in the municipality to grant licenses to rival companies at any time. A licensee who obtains a right to use streets does not obtain a monopoly. The right to grant other license remains open and unobstructed. Not only does the right to license other companies remain open, but the right to prescribe reasonable police regulations by a general ordinance also remains unimpaired. A private corporation that obtains a license to use the streets of a municipality takes it subject to the power of the municipality to enact a general ordinance; for a governmental power, such as that exercised in enacting police regulations, cannot be surrendered or bartered away even by express contract. But there is here no attempt to surrender or barter away this governmental power, for there is nothing more than a license to use the streets of the town. . . . Where a municipality attempts to regulate the mode of using its streets it must do so by a general ordinance, but it does not follow that a general ordinance is essential to the validity of a license granted to a designated company. It is one thing to specially license a corporation to lay pipes in a street or construct electric lines, and quite another to regulate the entire subject of supplying light, fuel, or the like, for where the municipal authorities assume to legislate upon the entire subject a general ordinance is required: but where they simply

grant a privilege to use the streets, and do not undertake to regulate the entire subject, a general ordinance is not indispensably necessary to authorize the licensee to use the streets. But neither by a general ordinance nor by a special license can discriminations be made or monopolistic privileges be created. It is, however, often true that a privilege is in its nature monopolistic, and, . . . when this is so, the grant of the franchise is of necessity the part of monopolistic right; but in such a case the corporate grant does not create the monopoly. In this instance there is nothing more than the grant of a license; there is no attempt to create exclusive privileges, nor any attempt to regulate the entire subject. The rights acquired under a mere permissive license are subject to control under the delegated governmental power vested in the municipality, for no licensee can acquire rights not subject to regulation under the police power delegated to the local governmental instrumentalities. We have here no question of contract rights, for the question presented by the record is whether a special ordinance granting a permissive license to a designated corporation is effective.”⁵⁹ In a case arising in the Federal Circuit Court of the Eastern District of Michigan it was said: “It is true it may, in effect, grant such exclusive right by refusing to any other company the franchise or privilege it has granted to one; but this presupposes a continued and abiding consent on the part of the city to keep alive its contract, and it is quite distinct from the right of the city to surrender its power to make another contract, and to vest in the plaintiff the right to determine for itself whether a rival company shall be permitted to enter its domain.”⁶⁰

§ 532. Contracts for light, length of term.

Another kind of municipal grants or contracts having in them monopolistic features is a contract to furnish a municipality all the light it needs for a term of years. These contracts in a measure are exclusive grants; for by them the gas

⁵⁹ Crowder v. Sullivan, 128 Ind. 486; 28 N. E. Rep. 94; 13 L. R. A. 647. See also State v. Cincinnati Gaslight and Coke Co., 18 Ohio St. 262.

⁶⁰ Saginaw Gaslight Co. v. Saginaw, 28 Fed. Rep. 529; 16 Am. and Eng. Corp. Cas. 562. See Garrison v. Chicago, 7 Biss. 480.

companies usually have the right for a term of years to supply the municipality with all the gas or light it needs and also its inhabitants; and frequently they contain agreements not to give similar grants to other companies while the contract remains in force. A case of this character arose in Indiana where it has been declared that a municipality cannot give an exclusive grant to a gas company, although this declaration was made many years after the case here referred to arose. A gas company was empowered by its legislative charter "to manufacture and sell gas . . . for the purpose of lighting" a certain city or its streets, "and any buildings, manufactories, public places, or houses therein contained," "for the term of twenty years." The same charter authorized the city, "in its corporate capacity . . . to contract with the said company to furnish gas for the purpose of lighting the streets, engine houses, market houses, or any public places or buildings, and may provide means to pay for the same in such manner as they may deem best." The general law for the incorporation of cities of a later date empowered them "to construct and establish gas works, or to regulate the establishment thereof by individuals or companies, or to regulate the lighting of streets, public grounds and buildings, and to provide, by ordinance, what part, if any, of the expense of lighting any street or alley shall be paid by the owners of lots fronting hereon." In 1876 a city entered into a contract with a gas company, in the form of an ordinance, whereby the latter agreed to furnish gas of a quality specified in an ordinance of 1866 for the supply of all the street lamps, city offices, engine houses, and all other places where gas was required for the use of the city in its corporate capacity, in consideration of an agreed compensation, the contract to be in full force and operation for the term of five years from its date, and a further term of five years, if the city so elected. It was agreed that this contract of 1876 should not be taken to alter, modify or suspend the provision of a contract then in existence between them, entered into by them in 1866 for a term of twenty years, except so far as to give effect to its terms; and when the contract of 1876 terminated, either by the expiration of the time limited, or by the failure or refusal of the city to

perform its part, then the contract of 1866 was to "stand and continue for the parties hereto . . . in all respects as though this contract had never been made." The city had the power under these contracts to clean and repair, at the company's expense, the street lamps if it did not; and to make certain deductions for failure to light lamps and keep them burning. The city denied the validity of the contract of 1876; but the court upheld it, saying that it was undoubtedly valid. No discussion was entered upon concerning the contract of 1866, but it seems to be conceded that it was valid. "By the contract we are considering," said the Supreme Court, "the city of Indianapolis is not restricted in any respect from the legitimate exercise of its public powers touching the subject matter of the contract, but expressly reserves its administrative authority to keep the posts, lamps and burners in good order and repair, if the gas company should fail to do so; and also reserves the right to test the quality of the gas furnished by the company, and the capacity of the burners, at all times. We cannot see wherein, by the contract, the city is restricted from extending its streets, establishing an additional number of lamps obtaining gas from other sources, or establishing its own gas works, as the public interests might require, and all this it can do without violating its contract. No exclusive right is granted to the gas company."⁶¹ It will be observed that in this

⁶¹ *Indianapolis v. Indianapolis, etc., Co.*, 66 Ind. 396.

The court called attention to the case of *Garrison v. Chicago*, 7 Biss. 480, relied upon by the city, where a ten-year contract was declared void, to the fact that it had been declared void because no appropriation for it had been previously made as the city charter expressly required. The court also pointed out that the case of *Gale v. Kalamazoo*, 23 Mich. 344, was an instance where the city has authorized Gale to build a market house, to be put under the control of the city authorities, the stalls to be rented as agreed

upon between Gale and the lessees, the rent to be paid to him, and the contract to run ten years. The village was to appoint a manager of the market, and there was to be no other market house in the village, and no marketing elsewhere during market hours. "The vice," said the Indiana court, "of this contract lay, not in its agreement to have a market house built, but in the fact that the public authorities had undertaken to part with their control over it when built, and place its management in the power of private speculators. This they could not do."

case the court held the five-year contract valid, although it was devoid of the exclusive features so often characteristic of these contracts, such as the contracts of 1866. Statutes frequently empower cities to make exclusive contracts with gas and water companies, for a certain number of years, and these are upheld by the courts; but the statutes are also limitations upon the powers of cities, for the limitation therein named cannot be exceeded; but if the attempt is made to exceed that limit, the entire contract will not be invalid if the excess can be distinctly separated from the remainder of the contract. Thus where a statute permitted a city to enter into a contract for twenty years, and a city entered into a contract for twenty years with a provision that it should remain in force for an additional twenty years if the city had not purchased the works before the expiration of the first term, the contract was held valid for the original twenty years.⁶² A contract for thirty years has been held not so long a time that the court would say as a matter of law it was unreasonable.⁶³ A statute empowering a municipality to contract for water from year to year, is sufficient to uphold a contract to extend for twenty years from the time of making it.⁶⁴ A contract to take a cer-

⁶² *Neosho City Water Co. v. Neosho*, 136 Mo. 498; 38 S. W. Rep. 89; *State v. Laeledge Gaslight Co.*, 102 Mo. 472; 14 S. W. Rep. 974; 15 S. W. Rep. 383. See *Manhattan Trust Co. v. Dayton*, 59 Fed. Rep. 327; 16 U. S. App. 588.

⁶³ *Oconto City Water Supply Co. v. Oconto*, 105 Wis. 76; 80 N. W. Rep. 1113; *Fergus Falls Water Co. v. Fergus Falls*, 65 Fed. Rep. 586; *Des Moines etc., R. R. Co. v. Des Moines, etc., Co.*, 73 Ia. 513; 33 N. W. Rep. 616; 35 N. W. Rep. 602 (25 years).

⁶⁴ *Light, H. and W. Co. v. Jackson*, 73 Miss. 598; 19 So. Rep. 771.

If the city council are expressly authorized to grant an exclusive privilege, the consent of the people of the city to such franchise is not

required. *Lawrence v. Hennessy*, 165 Mo. 659; 65 S. W. Rep. 717.

While an exclusive grant for twenty years is void so far as the limit is concerned; yet the company under it have the right to put its pipes in the street, no limit being fixed when its rights shall cease. *Hamilton v. Hamilton Gaslight Co.*, 11 Ohio Dec. 513.

In the following cases the contracts were held invalid, not because of the length of the term, but because the city had no power to execute an exclusive contract: *Long v. Duluth*, 49 Minn. 280; 51 N. W. Rep. 913 (30 years); *Brenham v. Brenham Water Co.*, 67 Tex. 542; 4 So. W. Rep. 143 (25 years); *Davenport v. Kleinschmidt*, 6 Mont. 502; 13 Pac. Rep. 249 (25 years).

tain amount of gas for a special period of time, leaving it the unrestricted right to either manufacture or purchase as much as it desires, is not a monopolistic contract, and is not invalid even in those States where the statute or constitution prohibit exclusive grants, and contracts.⁶⁵ The rule that members of a legislative body of a city may not so act or contract as to deprive their successors of the unimpaired governmental or legislative power does not apply to the exercise of the business or property proprietary powers of the city, such as is exercised in entering into a contract for gas or water.⁶⁶

§ 533. Dating contract ahead.

It is a favorite scheme of promoters to secure an exclusive right to occupy the streets of a city or town for the purpose of speculation, and not with the intention of themselves putting in a plant, unless they are not able to dispose of the rights they have obtained. If these grants do not require completion of the works for several years, then the municipal authorities in office have, in a measure at least, anticipated and exercised the authority of future officers of the city or town — a thing neither the legislature nor the courts are disposed to sanction. Courts, therefore, are inclined to construe grants giving rights to occupy streets and maintain plants as require immediate action on the part of the grantees, or within a reasonable time thereafter. Thus where a statute provided that from and after its passage any gas company should have the power to extend its mains or lay its pipes for conducting gas in any of the public highways of the towns where located, with the written consent of the public board of improvement, and under such reasonable regulations as it might prescribe, it was held that when such a company

⁶⁵ *Vincennes v. Citizens' Gaslight Co.*, 132 Ind. 114; 31 N. E. Rep. 573; 16 L. R. A. 485; *Valparaiso v. Gardner*, 97 Ind. 1; 49 Am. Rep. 416. The court calls attention to *Davenport v. Kleinschmidt*, *supra*, and *Matter of Union Ferry Co.*, 98 N. Y. 139, by pointing out that the

grants in these cases forbade the city or State dealing with any other person or company.

⁶⁶ *Illinois Trust and Savings Bank v. Arkansas*, 76 Fed. Rep. 271; 22 C. C. A. 171; 40 U. S. App. 257; 34 L. R. A. 518.

seeks to extend its mains or lay its pipes it was the duty of such board to then exercise its judgment as to whether consent shall be given; and it could not contract in advance that no other could have its consent to extend its mains or lay its pipes.⁶⁷

⁶⁷ *Parfitt v. Furguson*, 3 N. Y. App. 176; 73 N. Y. St. Rep. 621; 38 N. Y. Supp. 466; 159 N. Y. 111; 53 N. E. Rep. 707.

A statute provided that no franchise should be granted for a longer period than twenty years. An ordinance granted the right to lay gas

pipes in the streets for twenty years from the date of its taking effect. It was passed several months before it took effect. It was held that the grant was valid. *State v. Excelsior Coke & Gas Co.*, 69 Kan. 45; 76 Pac. Rep. 447.

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